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Supreme Court, U.S.
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In the Supreme Court of the United States

VELDA VELDA DOBSON-DAVIS, WARDEN;
EDMUND G. BROWN JR., ATTORNEY GENERAL, *Petitioners,*

v.

KRISTI LYN LUNBERY, *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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THIRD APPELLATE DISTRICT
(Shasta)

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DEENA C. FAWCETT
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THE PEOPLE, Plaintiff and Respondent, v. KRISTI LYN LUNBERY, Defendant and Appellant.	C046943 (Super. Ct. No. 01F8979)

Defendant Kristi Lyn Lunbery's husband was shot and killed in 1992. The case remained unsolved until 2001 when it was reopened and defendant confessed to killing him. A jury convicted her of second degree murder (Pen. Code, § 187, subd. (a)) and found she personally used a firearm in the commission of the offense. (Pen. Code, § 12022.5, subd. (a).) The trial court sentenced her to a total prison term of 19 years to life.

On appeal she contends the trial court abused its discretion by denying her the right to present evidence of third party culpability and erred by denying her request to admonish the jury following prosecutorial misconduct, impose requested sanctions on the prosecution for failing to preserve the identity of a confidential informant who possessed exculpatory evidence, and suppress her involuntary confession.

We find no error and shall affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

A. The Prosecution's Case

In April 1992, defendant, her husband Charley Bateson (Bateson), the victim in this case, and their two young daughters lived in a house on Fir Street in Burney. The family had moved into the house the previous month. Bateson owned a 30-30 Winchester Model 94 rifle with a lever action that defendant's grandmother had given him as a gift. He kept the rifle in its case in a closet at their prior residence on Ash Street. However, his father saw it in Bateson's truck the week before Bateson's death.

Belinda Strickland had been a neighbor of the Bateson family at their prior residence on Ash Street and was defendant's friend. At 11:47 a.m. on April 17th, Strickland received a collect telephone call from defendant, who said she was at the Mt. Shasta Mall in Redding, that she had a flat tire, Bateson was not answering the telephone, and she wanted Strickland to go over to defendant's house and wake up Bateson so he could help her. Strickland drove over to the Bateson residence, knocked on the front door, and then yelled at the window. Receiving no response, she entered the house through the unlocked front door. She heard a radio coming from the bedroom. The door to the bedroom was closed, so she opened it and found Bateson lying in the bed with the blankets pulled up to his neck. He appeared to be dead. Without entering the room or touching anything, she went to a nearby house and asked someone to call the police. She then drove to Bateson's parents' house

and told them he was dead. Strickland continued to socialize with defendant but they never spoke about Bateson's death.

Detective Clemens contacted defendant at the Mt. Shasta Mall where she was waiting with her two children, her grandfather, Francis Conley, and her grandmother, Ethyl Miles. She became visibly upset when told her husband was dead. The group walked to defendant's car in the mall parking lot. The left front tire was flat. There was glass on the ground by the tire and a piece of glass was imbedded in the tread.

Defendant went to the sheriff's office where Detective Clemens and another officer interviewed her. She told the officers that Bateson worked the swing shift at a lumber mill and that he finished working that morning at 3 a.m. When he arrived home, he woke defendant up and they briefly chatted before he joined her in the hide-a-bed in the living room where they slept.

Defendant and the children awoke about three hours later around 6:30 a.m. Bateson spoke to them for a short time and defendant told him she and the children were going shopping in Redding. He asked her to set the alarm for 11:30 a.m. and told her he was going to change the lock on the front door. He then moved to the children's bedroom to sleep. Defendant set the alarm, put it in the bedroom, and closed the door. She left a note for Bateson on the refrigerator just to remind him of what she had told him. She did not lock the front door because she generally did not lock it when Bateson was home.

Defendant left the house with the two children about 8:00 a.m. First, they went to her parents' house in Burney to drop off the dog. Her grandfather, who was staying in the house while he visited the family,

told defendant he was also going to Redding. Defendant and the children then proceeded to the mall where she parked her car. When she returned to the car after shopping, she discovered she had a flat tire and tried to call Bateson but he did not answer the telephone. Thinking she may have turned off the ringer on the telephone so he could sleep, she called Strickland and asked her to go wake up Bateson so he could help her with her tire. When she saw her grandfather in the mall, he agreed to wait with her.

Defendant explained to the officers that the lock on the front door of her house needed to be changed because the night before, when she got home around 6:15 p.m., about an hour and a half after Bateson had left to go to work, she found the front door unlocked and all the lights turned on. When she called Bateson at work, he told her he had left the door locked and the lights out. Defendant told the officers she thought her other grandmother, Margaret Beaman, had changed the lock when they moved into the house about two weeks before because the "people . . . who used to live there" kept driving by the house. Beaman had evicted those people because she believed, based on the large number of brief visitors to the house, that they "did drugs." The boyfriend of the woman who lived there would drive by and "stare" at defendant and her family.

Defendant informed the officers that Bateson owned a rifle that he used for deer hunting. She claimed not to have seen it since their recent move and did not believe Bateson kept it in his truck. Defendant claimed she and Bateson had no major problems and that things were "pretty smooth" between them. When asked about financial problems, defendant said she and Bateson were a couple of payments behind in certain things. Defendant

believed Bateson's life insurance policy had lapsed. She agreed to allow the officers to search her car, which when searched contained no weapons or evidence of blood stains. The officers did not see any blood on defendant's clothing or person either.

Meanwhile, Shasta County Sheriff's Sergeant Wooden, who was in charge of the crime scene investigation, went to the house where he found Bateson in a back bedroom, lying on his back in a child-sized bed covered with cartoon motif sheets, wearing only his undershorts. He had suffered one gunshot wound to the head, which was the cause of death.

The location and pattern of the fragments found from Bateson's skull, the bullet, and blood spatters on the floor, bedroom wall, door jam, and hallway just outside the bedroom door indicated that the bullet was fired from a high velocity rifle like a 30-30 and that the door to the bedroom was partly open when the gun was fired. Gunpowder marks on the pillow beneath Bateson's head indicated the muzzle of the gun was within four to six inches of his head when it was fired. According to Sergeant Wooden, the shooter may or may not have been splattered with blood and skull fragments.

A note on the refrigerator door in the kitchen read: "Hon, we ran down to Redding for a few more groceries and to look at a few things in the Target ad. I'll bring something home for dinner. Love, your three girls. P.S. Be back around 1:00 or so."

There was no evidence of forced entry or ransacking of the house and no evidence that someone tried to clean up the blood in the home or tried to clean it from his or her person. No firearm or

expended shell casings were found in the house.[1] Fingerprints and one palm print were lifted from the front and bedroom doors. A number of them belonged to Bateson and defendant, and one belonged to Strickland.

The bullet and jacketing removed from Bateson's body and the bullet fragments recovered from the crime scene were .30 caliber. The marks on the jacketing were consistent with the conclusion the bullet was fired from a Winchester Model 94 30-30 rifle, which fires .30 caliber bullets. That model was the most common rifle that could have made the marks, although they could have been made by 27 different types of weapons.

In 2001, Shasta County Sheriff's Detective Grashoff was assigned to reevaluate Bateson's death. On December 20, 2001, Detective Grashoff and Blankenship went to defendant's residence. She had been previously notified that they wanted to speak with her and consented to the interview. The detectives identified themselves, informed defendant of their cold case investigation and she invited them inside. During the interview, defendant initially reiterated the version of events she had related to detectives in 1992, with a few changes. She now recalled the lock on the front door had not been changed and the prior tenants may have had a key. She indicated that while she probably did not lock the door when she left the house the morning of Bateson's death, she was not concerned about leaving him in the house with an unlocked door. However, when she learned he had been shot, her first thought was to suspect her grandmother's former tenants

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[1] To eject an expended casing from a lever action rifle of the type owned by Bateson, the lever must be pulled to load another bullet into the firing chamber.

because they were "into drugs" and had told her grandmother at the time she evicted them that "she would pay." Defendant told the detectives that "the guy that used to live there . . . resembled [Bateson]."

Defendant further stated that she had known her current husband, Troy Lunbery, since 1985. During the period between 1985 and 1988, she and Bateson broke up for a period and she dated Lunbery before he went into the army. She did not reconnect with him until after Bateson's death in May 1992. Defendant also told the detectives she received about $15,000 from a life insurance policy that Bateson had through his job. About $4,000 or $5,000 of it went to pay funeral expenses.

Towards the end of the interview, after confronting defendant with a secret witness tip, an FBI profile on the case, and the inconsistencies in her story, the detectives told her they knew she did it, they just wanted to know why. Urging her to tell the truth, the detective asked her if she shot Bateson, and she responded "yes." She explained that he was asleep when she shot him and the bedroom door was already open. She recalled that Bateson's rifle was in the closet and must have been loaded, because she did not remember loading it. She remembered putting it in the car after she shot him and driving around a lot, but she did not remember what she did with the rifle. She did not plan the shooting. It was a spur of the moment thing. She and Bateson had just argued about car insurance and a bounced check before he went to sleep. However, she admitted that her call to Strickland may have been part of "a plan for her to find [Bateson]."

Upon further inquiry, defendant explained that she shot Bateson because she did not like the way he talked to her, that he was so controlling, that

no one could say "hi" to her without it causing an argument or arousing "suspicion that [she] was sleeping with them . . . ." She was "very stressed" at the time of the shooting because they were living in a small house, she was trying to take care of a three-month-old and a three-year- old, finances were tough, they lived paycheck to paycheck, and Bateson was "controlling." He would tell her "what [she] could and could not do . . . ." He "shut [her] off from everyone" and "grabbed" her by her arms "several times," leaving bruises.

Defendant told the detectives she "just wasn't thinking right" when she shot Bateson, explaining that "if you do something like that, you're not thinking straight. I have grown a lot in the last nine years." She would "never do something like that now. And that, even doing something like that then, that's not me. That is not in me. So, I obviously was not thinking straight. I mean, I couldn't have been."

Darci Hayes, who had been defendant's best friend since the first grade, testified that they often confided in each other and discussed their relationships with the men in their lives. In 1991, the two friends saw a movie entitled "Mortal Thoughts." After seeing the movie, they had a private running joke that Darci considered to be "wives venting" about things their husbands did that irritated them. The joke began during telephone conversations after they were both married with children and before Bateson's death. The joke was whether you would ever kill your significant other if you could get away with it. It was similar to the plot of the movie. During one such conversation between defendant and Hayes, defendant complained about Bateson asking her where she was going whenever "she would get up to leave a room."

Hayes moved away from Burney in 1987. However, when she returned for Bateson's funeral, the first thing defendant said to her when they were alone was "don't ever tell anyone we talked about that movie." This was the first and only time defendant made such a comment and was the last time she ever mentioned the movie. This comment was a reference to the movie "Mortal Thoughts."

B. The Defense

Defendant testified on her own behalf. She denied killing Bateson, removing a gun from the house the morning of April 17, 1992, or having any knowledge of the killing. She never had any exposure to firearms when she was growing up and never fired a gun. She denied seeing Bateson's rifle after they moved to Fir Street.

Defendant's testimony concerning the events surrounding the shooting was consistent with her 1992 interview. When her grandmother Miles appeared at the mall the morning of April 17th, and told defendant that Bateson had been shot, defendant fainted. She remained very upset and emotional in the aftermath of Bateson's death, spending most of her time in bed.

Defendant first met Bateson when she was in the eighth grade. When she graduated from high school, she attended Shasta College for about a half a semester. She wanted to study early childhood education and hoped to work with kids at a preschool. Defendant loved Bateson, they had a good relationship during the marriage, and he was a good father. They had no significant problems. He was not physically abusive or controlling. They had plans to buy their own house and raise their children.

Defendant's grandmother allowed them to move into her house on Fir Street rent free so they could save money for a down payment on a house.

Defendant testified that when the detectives interviewed her in 2001 she felt stressed but tried her best to help them out and to remember what she could. During the first part of the interview, the officers were "laid back and friendly," gathering details for their investigation. However, at some point, the detective told her they suspected her. While she told them she did not do it, they continued to accuse her. She became scared, nervous and overwhelmed. When the detective implored her to tell the truth for the sake of her children, his body language changed and he became more intense. She became scared because she did not know what he could do. She falsely confessed to shooting Bateson because she believed that is what the detectives wanted to hear, and as soon as she admitted shooting him, the detective's demeanor and tone changed. She thought she needed to give the detectives some information to get them to leave her house, so she falsely told them Bateson was controlling and abusive because they had already suggested that as a possible motive.

Defendant denied ever seeing the movie "Mortal Thoughts," having a running joke with Darci Hayes about that movie, or telling her that Bateson was overly possessive or concerned about her whereabouts. Defendant also denied telling Hayes at the time of the funeral not to mention the movie.

Many of defendant's family and friends testified to her passive, calm, gentle, sweet, caring and patient character, which in their opinion was completely inconsistent with someone who would shoot her husband.

DISCUSSION

I.
Exclusion of Third Party Culpability Evidence

Defendant contends she was denied her constitutional right to present a defense when the trial court excluded her proffered evidence of third party culpability. Respondent contends the trial court did not err because the evidence showed nothing more than that a third party had a motive and opportunity to commit the offense and therefore the evidence failed to meet the threshold under *People v. Hall* (1986) 41 Cal.3d 826, 226 Cal. Rptr. 112 (*Hall*). We agree with respondent.

A. The Proffered Evidence

In response to the People's motion to exclude evidence of third party culpability, defendant proffered the following items of evidence:

(1) Margaret Beaman, defendant's grandmother, was the owner of the Fir Street residence where the killing occurred. A short time before defendant and Bateson moved into that residence, it was occupied by Cynthia Ellis and her ex-husband Frank Delgado, a known drug dealer. After Ellis and Delgado moved in, Ms. Beaman noticed an increase in traffic to and from the house at all hours of the day and night in a relatively rural area, consistent with drug sales, and she evicted them because of that activity.

(2) A confidential informant (CI) told Shasta County Sheriff's Detective Willie Cox on April 20, 1992, that the killing of Bateson was a mistake and that the intended victim was Frank Delgado because

Delgado had "ripped off several people in town over drug dealings."

(3) Finger and palm prints were lifted from the murder scene that did not match any of the exemplars from people who would have been in the residence in the recent past.

(4) On April 16, 1992, defendant returned home to find the front door unlocked even though Bateson was at work. Because this was a very unusual situation, she called him at work because she was concerned about this.

(5) At approximately 3:30 a.m. on April 16th, a neighbor who lived across the street from the Bateson residence saw a dilapidated Ford Fiesta drive down Fir Street, make a u-turn at the dead-end, park in front of the Bateson residence for 20 to 30 seconds, and then drive away at a fast rate of speed. A CI told Detective Cox that Delgado and at least one of Delgado's acquaintances from the drug-world were associated with that vehicle.

(6) Two weapons not connected to defendant could not be ruled out as the murder weapon.

(7) When Ms. Beaman evicted Delgado, he told her "she would be sorry."

(8) Oney Rhoades, an acquaintance of Delgado's, had stayed at the Fir Street house with Delgado in late February and saw Delgado and Henry Garza in possession of a flask of dope worth $ 40,000.

(9) A Sheriff's sergeant told a detective that Bateson bore a strong resemblance to an individual who had recently been employed as an undercover agent who had attempted to buy drugs from Delgado and others.

(10) Rory Keim told the police that he and some friends were in a restaurant discussing Bateson's death when Henry Garza, who was sitting nearby, approached them and said "that's a bummer, my partners blew away the wrong dude." At the time of the offer of proof, Garza was deceased.

The court granted the People's motion to exclude this evidence. The court based its ruling on its conclusions that inadmissible hearsay cannot form the basis for third-party culpability evidence, there was an insufficient showing under *Hall, supra,* 41 Cal.3d 826, and the evidence was inadmissible under Evidence Code section 352 because it had slight probative value, was prejudicial to the prosecution, would be very time consuming, was likely to mislead and confuse the jury, and was insufficient to raise a reasonable doubt of defendant's guilt. The court advised counsel however, that he could inquire into exculpatory fingerprint or firearm evidence in order to give evidentiary weight to defendant's claim she did not commit the murder.

B. Analysis

We review the trial court's ruling for abuse of discretion, which we may find only if the ruling exceeded the bounds of reason, considering all the circumstances. (*People v. Lewis* (2001) 26 Cal.4th 334, 372; *People v. Adams* (2004) 115 Cal.App.4th 243, 252-523.)

The admissibility of third-party culpability evidence is governed by the same rules governing the admissibility of other evidence. It is admissible if it is relevant to raise a reasonable doubt of the defendant's guilt (Evid. Code, § 350) and its probative value is not substantially outweighed by the risk of

undue delay, prejudice, or confusion. (Evid. Code, § 352; *Hall, supra,* 41 Cal.3d at p. 834; *People v. Bradford* (1997) 15 Cal.4th 1229, 1325.) In determining the probative value, the Supreme Court has held that "evidence of mere motive or opportunity to commit the crime in another person, without more, will not suffice to raise a reasonable doubt about a defendant's guilt: there must be direct or circumstantial evidence linking the third person to the actual perpetration of the crime." (*Hall, supra,* 41 Cal.3d at p. 833.)

The only real evidence directly or circumstantially linking someone other than defendant to the murder is Rory Keim's statement that Henry Garza said his partner killed the wrong man. However, as the trial court correctly noted, inadmissible hearsay statements cannot form the basis for a third party culpability defense. (*People v. Bradford, supra,* 15 Cal.4th at pp. 1324-1325.) Defendant claims this evidence is admissible as a statement against penal interests because Garza knew it was his crime partner who committed the homicide and that the offense was a case of mistaken identity. Respondent contends the trial court correctly concluded this statement was not against Keim's penal interest because he did not admit, and implicitly denied, playing any personal role in the murder. We agree with respondent that Keim's statement was properly excluded.

Because Keim's statement was offered for its truth, it is hearsay. (Evid. Code § 1200 , subd. (a); *People v. Duarte* (2000) 24 Cal.4th 603, 610.) A hearsay statement made against the declarant's penal interest is admissible under Evidence Code section 1230, which provides in pertinent part: "Evidence of a statement by a declarant having

sufficient knowledge of the subject is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness and the statement, when made, . . . so far subjected him to the risk of . . . criminal liability . . . that a reasonable man in his position would not have made the statement unless he believed it to be true."

When proffering such evidence, "the proponent of such evidence must show that the declarant is unavailable, that the declaration was against the declarant's penal interest when made and that the declaration was sufficiently reliable to warrant admission despite its hearsay character." (*People v. Duarte, supra,* 24 Cal.4th at pp. 610-611.)

The offer of proof indicates that Keim spoke to Detective Compomizzo on May 6, 1992, and told him that he and some friends were recently at a pizza parlor discussing Bateson and his death. Garza, who was sitting a few tables away, approached them and said "that's a bummer, my partners blew away the wrong dude."

The requirement of unavailability was met because Garza was deceased at the time the evidence was proffered. However, Garza's statement did not satisfy the second and third requirements of the hearsay exception. It was not against his penal interest because it did not implicate him in the commission of the murder and his use of the words "my partners" did not establish he used that term to mean his partners in committing the Bateson murder or any other offense. Additionally, the statement lacks sufficient indicia of reliability. Garza made the statement to Keim and Keim's friends in a pizza parlor after eavesdropping on their conversation. According to the detective's report, Keim stated that Garza was "drinking and arguing" with some other

people when he made this statement.[2] The statement may have been nothing more than boasting or the mindless remark of someone under the influence of alcohol. Additionally, the report states that Garza "did not indicate any names or how the shooting took place." Thus, there is no indication he had personal knowledge of the murder. Indeed, his statement may have been based on multiple levels of hearsay. The statement was therefore inadmissible.

The remaining items of proffered evidence are also inadmissible. At best, some of the evidence showed that Frank Delgado or others may have had a motive and/or the opportunity to murder Bateson, either in revenge for being evicted or as the unintended victim in a case of mistaken identity (items 1, 2, 4, 5, 7.) As such, the evidence was inadmissible because it lacked sufficient probative value to raise a reasonable doubt of defendant's guilt under Hall, supra, 41 Cal.3d at page 833. Likewise, the fingerprint and weapons evidence had little probative value (items 3, 6),[3] the CI's statement was inadmissible hearsay (item 5) (Evid. Code. § 1200, subd. (a)), and the evidence that Delgado was

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[2] This report was submitted to the trial court in connection with another matter at approximately the same time the motion to exclude the third-party culpability evidence was made and therefore was before the court when it ruled on the People's motion to exclude the third-party culpability evidence.

[3] The fingerprint and palm print evidence only established that other people had been in the house. Since defendant and her family had only lived in that house for approximately two weeks, the presence of other prints is not surprising. Similarly, the fact two other weapons could not be ruled out as the murder weapon, does not constitute direct or circumstantial evidence linking someone else to the offense.

involved with drugs was inadmissible character evidence. (item 8) (Evid. Code, § 1101; *People v. Adams, supra,* 115 Cal.App.4th at p. 253.)[4]

Defendant did not proffer any admissible direct or circumstantial evidence linking anyone other than defendant to the actual murder, such as blood stained clothing, identifiable fingerprints, palm prints, or shoe prints, or eye witness testimony that someone other than defendant was seen entering or exiting the Bateson residence during the early morning of April 17, 1992. (See *People v. Alcala* (1992) 4 Cal.4th 742, 793.) The fact someone saw a Ford Fiesta at 3:30 a.m. the morning before the murder was not probative. It remained there for only 20 to 30 seconds and no one was seen exiting or entering the car at that time. Accordingly, because the proffered evidence was insufficient to raise a reasonable doubt about defendant's guilt, the trial court did not abuse its discretion in excluding it.

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[4] Much of this evidence was nevertheless introduced into evidence by way of defendant's tape-recorded interviews and expert testimony. Defendant told detectives that her grandmother, Ms. Beaman, evicted Ellis and Delgado because of apparent drug dealing and that one of them told her she would "pay" for evicting them (items 1 and 7), that those people continued to drive by the house and stare at defendant and her family (item 6), that the day before the killing defendant returned to the house and found the door unlocked and the lights on suggesting that someone might have gained access to the house that day (item 4), and that the man who used to live in the house looked like Bateson (item 9). Expert testimony showed there were unidentified fingerprints in the house and an unidentified palm print on the bedroom door molding while the firearm expert acknowledged that several types of firearms other than Bateson's missing rifle could have been the murder weapon (items 3 and 6). Additionally, the defense introduced evidence that the crime scene investigator found unidentified footprints in a wooded area near the house.

II.
Failure to Admonish the Jury About Prosecutorial Misconduct

Defendant contends the trial court committed prejudicial error when it denied her request for an admonition following prosecutorial misconduct in closing argument. Respondent contends any error was harmless. We agree with respondent.

During his opening argument to the jury, the prosecutor spoke about defendant's 2001 statement to detectives in which she confessed to shooting her husband. While pointing out the circumstances of the interview, the prosecutor stated "although it was a confrontative interview, it clearly was not a coercive interview. And you never would have heard that interview if it was a coercive interview."

Shortly afterwards, the court recessed and defense counsel objected to the prosecutor's remark on the grounds it could leave the jury with the erroneous impression the court had previously determined the confession was not coerced. Counsel suggested that the court admonish the jury with a curative instruction, which would have informed the jury the court had not concluded there was no coercion and that it was for the jury to decide whether there was coercion and the weight to give it. The court agreed that someone could draw an inference from the prosecutor's remark that the confession had passed judicial muster but declined to admonish the jury, concluding that it would only aggravate the situation. The court suggested that the parties clarify the matter during their remaining arguments.

The parties then argued their respective positions as to whether the confession was coerced

and whether the jury should find defendant's confession was true. Neither party however addressed the issue whether the court had made a prior finding on the question of coercion or that it was the jury's role to make that determination.

Although the prosecutor has broad discretion to discuss the legal and factual merits of a case, it is improper to mislead the jury by misstating the law. (*People v. Bell* (1989) 49 Cal.3d 502, 538, 262 Cal. Rptr. 1.) Because an involuntary confession is inadmissible, when the voluntariness of a confession is in dispute, it is for the trial court to make that legal determination in the first instance outside the presence of the jury. (*Jackson v. Denno* (1964) 378 U.S. 368, 386 [12 L. Ed. 2d 908, 921].) Evidence Code section 405 sets forth the procedure for making that determination. (*People v. Carroll* (1970) 4 Cal. App. 3d 52, 59-60, 84 Cal. Rptr. 60.)

However, while the jury cannot redetermine the admissibility of a confession (See Evid. Code, § 405, subd. (b)(2)), the defendant has the right to produce evidence of coercion at trial bearing upon the truth or falsity of her confession and the weight to be given it. (*Jackson v. Denno, supra,* 378 U.S. at p. 386, fn. 13 [12 L. Ed. 2d at p. 92]; *People v. Memro* (1985) 38 Cal.3d 658, 684, fn. 28, 214 Cal. Rptr. 832; *People v. Carroll, supra,* 4 Cal. App. 3d at p. 60.)

As the trial court found, the prosecutor's statement may have misled the jury about its role in determining the issue of coercion by implying the issue had already been determined by the court. Nevertheless, because the trial court properly instructed the jury on its role during the instructional phase of the trial, neither the prosecutor's remark nor the court's failure to admonish the jury at the time the remark was made

resulted in a miscarriage of justice. (*People v. Watson* (1956) 46 Cal.2d 818, 835.)

Defendant contends the prosecutor's remark was prejudicial because it was made during closing argument and the primary factual issue in the case was the reliability and credibility of her confession. While we do not disagree with defendant's claim the confession was the center piece of the prosecution's case, we disagree with her conclusion the prosecutor's remark was prejudicial.

The remark was a single isolated comment that was ambiguous and may have been misleading to some jurors at the time it was made. However, any confusion was dispelled by the court's instructions to the jury. As part of its instructional charge, the trial court told the jury it was to determine what facts were proved from the evidence at trial and not from any other source, that statements made by the attorneys during the trial were not evidence, and that the jury had to accept and follow the law as the court stated it, even if its statement conflicted with the attorneys' statements. The court also defined the terms "confession" and "admission" and then immediately informed the jury, "You are the exclusive judges as to whether the defendant made a confession or an admission, and if so, whether that statement is true in whole or in part." We must assume the jury understood and faithfully followed the court's instructions. (*People v. Chavez* (2000) 84 Cal.App.4th 25, 30-31.)

These instructions adequately clarified the jury's role in determining the issue of coercion. Because defendant claimed the detectives coerced her into falsely confessing and both parties fully argued that question, the instructions given were adequate to inform the jury of its fact-finding role. The trial

court was under no duty to give an admonition at the time the challenged remark was made when the jury had been properly instructed on its fact-finding role during the instructional phase of the trial. Accordingly, we find defendant was not prejudiced by the court's failure to admonish the jury as requested.

III.
Failure to Impose Sanctions on the Prosecution For Failing to Preserve Exculpatory Evidence

Defendant contends the trial court erred in failing to impose requested sanctions on the prosecution for its failure to preserve the identity of a confidential informant who possessed exculpatory evidence. Respondent contends this claim has no merit because defendant failed to show the prosecution acted in bad faith or that she was prejudiced by the loss of the evidence. We agree with respondent.

A. Factual Background

An investigative report summarized the statement made by a CI to Detective Cox in 1992. The report states that the CI told Cox he knew Bateson, that the CI "felt the murder was a mistake" and the "CI thought Frank Delgado was supposed to have been killed." The CI explained that it was about drugs and that Delgado had "ripped off several people in town over drug dealings." The CI noted that Delgado had usually slept until the afternoon in the same bedroom where Bateson was killed, and along with Henry Garza, was associated with a white Ford Fiesta with reddish orange stripes. The CI identified three people who could "possibly" have murdered

Bateson believing he was Delgado: (1) the brother of Cindy Ellis, whose name the CI did not know, but who did not get along very well with Delgado, (2) Ellis's current boyfriend, Les, who had a feud with Delgado over Ellis and drugs, or (3) someone associated with Henry Garza, who Delgado suspected of working for the police, such as Rhodes or the Lagoo families.

Defendant filed a pretrial motion for disclosure of the identity of the CI. The prosecutor opposed the motion asserting that he did not know the CI's identity and it was no longer known to law enforcement. Additionally, the prosecutor argued that it appeared the CI did not have any personal information and that his information was a matter of pure speculation as if "someone walked off the street and gave a bunch of theories about what had happened . . . ."

When the court asked defense counsel why he had not contacted Garza and Delgado, counsel advised the court that he had made fruitless attempts to do so. Counsel asked for a hearing on law enforcement's reasonable attempts to preserve the CI's name and address and that it would move for sanctions, depending on the outcome of that hearing.

Nevertheless, the court held a hearing at which Captain Cox testified. Cox confirmed he had no current recollection of the CI's identity, that he unsuccessfully searched his files for his notes, and he had no way to obtain the information. He testified that his office investigated the possibility that Bateson's murder was the result of mistaken identity, that at the time the CI provided the information to him, he considered it important to the investigation, but he "absolutely" denied doing

anything to "intentionally destroy information that would lead to the identify of this informant . . . ."

Characterizing the failure to preserve the CI's identity as "negligence," defense counsel requested that the court dismiss the charges against defendant as an appropriate sanction. In the alternative, he requested that the court admit as evidence the CI's hearsay statements or instruct the jury that the defense was unable to contact the individual who might have had information.

Finding the information in the report pure speculation on the part of the CI, the court denied the motion and declined to impose any sanctions on the prosecution.

At trial, the defense renewed its request for evidentiary or instructional sanctions. Counsel advised the court he was not arguing that Cox acted in bad faith. The court impliedly denied the request.[5]

B. Analysis

In *California v. Trombetta* (1984) 467 U.S. 479 [81 L. Ed. 2d 413], law enforcement failed to preserve the defendant's breath samples used to determine blood-alcohol level in prosecutions for driving under the influence of alcohol. The court found California's policy of not preserving breath samples does not violate a defendant's due process rights. The duty to preserve evidence is "limited to evidence that might be expected to play a significant role in the suspect's defense. To meet this standard of constitutional materiality, [citation], evidence must both possess an

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[5] The matter was heard at the same time as the motion to exclude third-party culpability evidence. Although the court granted the prosecution's motion to exclude, it did not expressly rule on the defense request for sanctions.

exculpatory value that was apparent before the evidence was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means." This standard was not met where the "chances were extremely low that the samples would have been exculpatory" and the defense could still attack the reliability of the breath tests. (*Id.* at pp. 488-489 [at p. 422-423], fn. omitted.)

In *Arizona v. Youngblood* (1988) 488 U.S. 51 [102 L. Ed. 2d 281] (*Youngblood*), the state court reversed the defendant's convictions for child molestation, sexual assault, and kidnapping, because state officials failed to preserve semen samples from the victim's body and clothing. Defendant raised a mistaken identity defense. Reversing the state court's decision, the high court held "that unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law." (*Id.* at p. 58 [at p. 289], italics added.)

The court in *Youngblood* reasoned that "the Due Process Clause of the Fourteenth Amendment, as interpreted in *Brady*[6] makes the good or bad faith of the State irrelevant when the State fails to disclose to the defendant material exculpatory evidence. But we think the Due Process Clause requires a different result when we deal with the failure of the State to preserve evidentiary material of which no more can be said than that it could have been subjected to tests, the results of which might have exonerated the defendant. Part of the reason for the difference in treatment is found in the

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[6] *Brady v. Maryland* (1963) 373 U.S. 83 [10 L. Ed. 2d 215].

observation made by the Court in *Trombetta, supra,* [467 U.S. at page] 486, that 'whenever potentially exculpatory evidence is permanently lost, courts face the treacherous task of divining the import of materials whose contents are unknown and, very often, disputed.' Part of it stems from our unwillingness to read the 'fundamental fairness' requirement of the Due Process Clause, [citation], as imposing on the police an undifferentiated and absolute duty to retain and to preserve all material that might be of conceivable evidentiary significance in a particular prosecution. We think that requiring a defendant to show bad faith on the part of the police both limits the extent of the police's obligation to preserve evidence to reasonable bounds and confines it to that class of cases where the interests of justice most clearly require it, i.e., those cases in which the police themselves by their conduct indicate that the evidence could form a basis for exonerating the defendant." (488 U.S. at pp. 57-58 [at p. 289].)

Thus, a due process violation occurs when law enforcement officials fail to preserve evidence that is exculpatory, the exculpatory value was apparent before the evidence was destroyed, and was of such a nature that the defendant would be unable to obtain comparable evidence by other means. (*Trombetta, supra,* 467 U.S. at p. 489 [81 L. Ed. 2d at p. 422].) However, when the evidence in question is only potentially useful, the defendant must show bad faith on the part of the police. (*Youngblood, supra,* 488 U.S. at p. 58 [102 L. Ed. 2d at p. 289]; *People v. Catlin* (2001) 26 Cal.4th 81, 160.)

The trial court's failure to impose sanctions was proper. The information provided by the CI was not exculpatory in nature. As defense counsel conceded at the hearing, it was nothing more than

pure speculative hearsay based on rumor and innuendo. The most that can be said for the CI's identity is that it might have led to potentially exculpatory evidence. Defendant was required therefore to show that Captain Cox acted in bad faith by failing to preserve the CI's identity. However defendant characterized Cox's treatment of the information as "negligent" and impliedly conceded at trial there was no bad faith.

Nevertheless, citing a footnote in *Youngblood, supra,* 488 U.S. at page 56 [102 L. Ed. 2d at p. 288], defendant now claims for the first time on appeal that Captain Cox acted in bad faith. She bases this claim on the mere fact he testified that he knew of the exculpatory value of the evidence at the time it was lost or destroyed. In view of defendant's concession that Cox did not act in bad faith, she has waived her right to make a contrary claim at this late date. (*People v. Michaels* (2002) 28 Cal.4th 486, 511.)[7]

Third, as the trial court found at the initial hearing, the defense had all the evidence the CI had and therefore it was not clear what more the CI could disclose even if he or she could be located. The investigative report of the CI's statement identified several possible suspects by name including the names of the men associated with the Ford Fiesta. The defense therefore had sufficient information to investigate its third-party culpability defense. The fact those leads were fruitless only underscores the

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[7] While knowledge of the exculpatory value of the evidence may be a factor in finding bad faith (Youngblood, supra, 488 U.S. at p. 56 [102 L. Ed. 2d at p. 288]), Youngblood does not hold that it is the only factor. After hearing testimony on the issue, the trial court found the loss of the CI's identity was not the result of bad faith. We will not disturb that finding on this record.

conjectural nature of the information and does not alter our conclusion that the defense was able to obtain comparable information by other means.

Accordingly, because the information was not material and bad faith was not shown, the trial court properly denied defendant's request for sanctions.

IV
Defendant's Confession Was Voluntary

Defendant contends failure to suppress her confession was error because under the totality of the circumstances, her 2001 interview was involuntary. Respondent contends the trial court properly determined the confession was voluntary. We agree with respondent.

A. Factual Background

In defendant's motion to exclude her confession, she argued that it was involuntary because the detectives conducted it with threats and implied promises of leniency and psychological coercion concerning her children. The trial court read the transcript, listened to portions of the tape identified by counsel, and heard testimony from the two detectives who conducted the interview, as well as defendant. The following testimony was given:

Detective Grashoff testified that he suspected defendant of killing Bateson and went to her house to get a confession. Defendant was expecting Detective Grashoff when he and Detective Blankenship arrived at her home. The detectives were wearing civilian clothing and were both carrying weapons. The interview was conducted around defendant's kitchen table. The detectives falsely told defendant a

prosecutor had been assigned to the case and that they were close to solving it, and showed her a document of a "Secret Witness" tip, which they had created themselves. They also showed her the cover sheet of an FBI "profile" on the case.

Defendant testified that she was 32 years old at the time of the interview, she was a high school graduate, and had attended half of a semester at Shasta College. At the time she made her statement, her children were everything to her. All she ever wanted was to be married with a family. She took care of her three children and Jim, a developmentally disabled man with the mental capacity of a four-year old, who was present in the house during the interview. The detectives spoke with her about matters unrelated to their investigation for about five to 10 minutes before turning on the tape recorder. They then questioned her about her recollection of the day before and the day of the killing. She did not feel she was under suspicion at that time.

Defendant tried to cooperate but she felt the detectives were not hearing her. She became stressed during the interview because Jim kept interrupting and it was becoming apparent that the detectives did not believe what she was telling them. When they became accusatory, she became nervous, scared, and intimidated because she did not know what they could do. She knew she had rights but did not know what they were. When the detectives began mentioning her children and imploring her to tell the truth so they could tell the district attorney she had cooperated, she became concerned the detectives could take her children away from her. She thought if she told them what they wanted to hear by falsely confessing, she would be allowed to remain with her

children and the detectives would leave her and her children alone.

At the conclusion of the hearing and after listening to the interview, the court found the interview was calm throughout and there was nothing overbearing, threatening, or intimidating about the officers' conduct. The court concluded the prosecution had proven that defendant's confession was voluntary beyond a reasonable doubt and that under the totality of the circumstances, the confession was not coerced, but was an exercise of free will. It therefore denied the motion to exclude the confession.

B. Analysis

When the defendant challenges her confession as involuntary, it is inadmissible at trial unless the prosecution establishes by a preponderance of the evidence that it was voluntary. (*People v. Williams* (1997) 16 Cal.4th 635, 659-660.) "A confession or admission is involuntary, and thus subject to exclusion at trial, only if it is the product of coercive police activity." (*Id.* at p. 659.) The appellate court reviews the trial court's determination on the issue of voluntariness de novo, while reviewing the trial court's historical findings of fact surrounding the confession under the deferential substantial evidence standard. (*Id.* at pp. 659-660.)

"In deciding the question of voluntariness, the United States Supreme Court has directed courts to consider 'the totality of circumstances.' [Citations.] Relevant are 'the crucial element of police coercion [citation]; the length of the interrogation [citation]; its location [citation]; its continuity' as well as 'the defendant's maturity [citation]; education [citation];

physical condition [citation]; and mental health.'" (*People v. Williams, supra,* 16 Cal.4th at p. 660, quoting *Withrow v. Williams* (1993) 507 U.S. 680, 693-694 [123 L. Ed. 2d 407, 420].)

A confession is voluntary if the suspect's decision to speak is entirely "self-motivated" because she freely and voluntarily chooses to speak without any form of compulsion or promise of reward. (*People v. Thompson* (1980) 27 Cal.3d 303, 327-328, 165 Cal. Rptr. 289.) No single factor is dispositive in determining the question of voluntariness. (*People v. Williams, supra,* 16 Cal.4th at p. 660.)

As defendant acknowledges, lies told by the police to a suspect under questioning do not render the confession involuntary per se. The court must look to see whether the deception is reasonably likely to procure an untrue confession. (*People v. Farnam* (2002) 28 Cal.4th 107, 182.) Similarly, police trickery, by itself, does not render a confession involuntary (*People v. Thompson* (1990) 50 Cal.3d 134, 167, 266 Cal. Rptr. 309), because subterfuge is not necessarily coercive. (*People v. Felix* (1977) 72 Cal. App. 3d 879, 885-886, 139 Cal. Rptr. 366.) Thus, if the defendant is led to believe she might reasonably expect benefits in the nature of more lenient treatment at the hands of the police, the prosecution, or the court, in consideration of making the statement, even if truthful, such motivation is deemed to render the statement involuntary. (*People v. Holloway* (2004) 33 Cal.4th 96, 115.) However, mere advice or exhortation that it would be better to tell the truth, when unaccompanied by either a threat or a promise, does not render a subsequent confession involuntary when the benefit pointed out is merely that which flows naturally from a truthful statement. (*Ibid.*)

Here the relevant considerations support the trial court's finding that the confession was voluntary. At the time of the interview, defendant was 32 years old, had graduated from high school and had attended college for a short time. She consented to the interview, which took place in her home around the kitchen table. The detectives were in plain clothes and defendant was not under arrest. She was free to move about her home and to speak to someone. Defendant had been living for nine years with the horrible secret that she killed her husband. During the interview, detective Grashoff reviewed the events leading up to and following the killing, pointed out the inconsistencies in defendant's story, informed her that her denials were no longer credible, and that the matter would not go away if she continued to deny that she killed her husband. He did not badger her. The detectives' promises that they would not arrest her that day, they would immediately leave upon her request, and that she could halt the interview at any time, further served to eliminate a coercive atmosphere. Any implied benefits arising from their statement that they would inform the prosecutor of her cooperation if she gave a truthful statement, was merely that which would flow naturally from such a statement.

The interview lasted approximately two hours. After telling the detectives that she shot Bateson, and explaining why she did it, defendant admitted that she felt a little better having told the truth and that it was off her heart. She explained that when she shot Bateson, she was not thinking right, that she was 22 years old when she shot him, she had grown a lot in the last nine years and would never do something like that now. When the detective asked her how often she thought about it during the past

nine years, she stated, "all the time." When he asked her if she was being honest with him she replied, "Yes, I am being honest. If I wasn't gonna be honest with you I could have sat here and said 'no.'" At the end of the interview, the detective asked defendant how many times she shot Bateson. She said she "snapped" and did not know what she did. When the detective repeated, "How many times?" she stated "I don't remember. I'm not gonna say a number if I don't know. So." These are not the responses of a person who has been coerced into falsely confessing. To the contrary, they demonstrate that she was acting under her own free will and in her own interests.

Nevertheless, defendant argues that when the detective told her she should not let "this thing bite you in the butt on down the road with your kids" he created an inference that defendant would get more lenient treatment if she confessed and would not lose her kids. We disagree. The detective stated, "You don't want this thing, . . . down the road, it's gonna come up sooner or later. And they're gonna take you away from your kids. I'm giving you the opportunity now to tell the truth." We fail to see any promise of leniency in this statement. The detective was merely suggesting that if defendant did not presently own up to her crime, it would eventually catch up to her and her children and she would lose them sooner or later.

The detective's statement, "if you're guilty, I mean that's the best thing to do is get an attorney," does not imply that defendant is guilty. When defendant indicated that she wanted to talk to someone first, the detective stated "You don't want to tell the truth then that's fine. You want to talk to somebody first that's fine. Maybe we can set up an appointment later to talk about it. But, I'm just

offering you the opportunity now for you to tell the truth. I mean you're the one that has to deal with it. I really feel sorry for your kids." Defendant then stated that she did not "remember, things." After asking her what she did not remember, he said, "Okay, I'll ask you. Straight up. Did you shoot Charlie?" whereupon defendant said, "Yes." Again, there is nothing in this line of inquiry that threatened defendant with the loss of her children if she did not immediately confess. The detective was merely suggesting that it is difficult to live with a lie and that he feels sorry for the children because they are also affected.

We therefore conclude under the totality of circumstances, the confession was voluntary. Accordingly, the trial court properly denied defendant's request to suppress the confession.

DISPOSITION

The judgment is affirmed.

BLEASE, Acting P. J.

We concur:

ROBIE, J.

BUTZ, J.

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

KRISTI LYN LUNBERY,

Petitioner, No. CIV S-07-1279 GGH P[1]

vs.

TINA HORNBEAK, et al.,

Respondents. ORDER

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I. Introduction and Summary

This action is proceeding on the petition transferred to this court from the United States District Court for the Northern District of California on June 28, 2007.

Petitioner is a state prisoner proceeding through counsel with a petition for writ of habeas corpus. Petitioner challenges her 2004 conviction for second degree murder with personal use of a firearm (Cal. Penal Code §§ 187(a); 12022.5.) Petitioner is serving a sentence of nineteen years to life.

In a modern day version of Edgar Allan Poe's, *Tell Tale Heart,* petitioner confessed to the crime of murdering her husband long after she had been thought not to be a suspect. The evidence at the time of the murder, including an "I'm -out-of-the-house"

[1] This case proceeds before the undersigned pursuant to 28 U.S.C. § 636(c).

love note written to petitioner's husband conspicuously posted in the residence, and petitioner's seeming air tight out-of-the-house alibi had pointed away from petitioner.

Despite what some might term attempts to create the perfect crime, she confessed years afterwards due to the vigorous interrogation of police who were conducting a cold case investigation. Petitioner raises the following claims: (1) her trial counsel rendered ineffective assistance; (2) the trial court violated her right to a fair trial by excluding evidence of third party culpability; (3) her rights to a fair trial and to present a defense were violated by the failure of the trial court to impose appropriate sanctions on the prosecution for failure to preserve information regarding the identity of a confidential informant; (4) her right to due process was violated by the trial court's failure to admonish the jury following prosecutorial misconduct; and (5) her right to due process was violated by the admission into evidence of her involuntary confession.

After carefully considering the record, the court orders that the petition be denied.

II. Anti-Terrorism and Effective Death Penalty Act (AEDPA)

The AEDPA "worked substantial changes to the law of habeas corpus," establishing more deferential standards of review to be used by a federal habeas court in assessing a state court's adjudication of a criminal defendant's claims of constitutional error. Moore v. Calderon, 108 F.3d 261, 263 (9th Cir. 1997).

In Williams (Terry) v. Taylor, 529 U.S. 362, 120 S. Ct. 1495 (2000), the Supreme Court defined

the operative review standard set forth in § 2254(d). Justice O'Connor's opinion for Section II of the opinion constitutes the majority opinion of the court. There is a dichotomy between "contrary to" clearly established law as enunciated by the Supreme Court, and an "unreasonable application of" that law. Id. at 1519. "Contrary to" clearly established law applies to two situations: (1) where the state court legal conclusion is opposite that of the Supreme Court on a point of law, or (2) if the state court case is materially indistinguishable from a Supreme Court case, i.e., on point factually, yet the legal result is opposite.

"Unreasonable application" of established law, on the other hand, applies to mixed questions of law and fact, that is, the application of law to fact where there are no factually on point Supreme Court cases which mandate the result for the precise factual scenario at issue. Williams (Terry), 529 U.S. at 407-08, 120 S. Ct. at 1520-1521 (2000). It is this prong of the AEDPA standard of review which directs deference to be paid to state court decisions. While the deference is not blindly automatic, "the most important point is that an *unreasonable* application of federal law is different from an incorrect application of law....[A] federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable." Williams (Terry), 529 U.S. at 410-11, 120 S. Ct. at 1522 (emphasis in original). The habeas corpus petitioner bears the burden of demonstrating the objectively unreasonable nature of the state court decision in light of controlling Supreme Court authority.

Woodford v. Visciotti, 537 U.S. 19, 123 S. Ct. 357 (2002).

The state courts need not have cited to federal authority, or even have indicated awareness of federal authority in arriving at their decision. Early v. Packer, 537 U.S. 3, 123 S. Ct. 362 (2002). Nevertheless, the state decision cannot be rejected unless the decision itself is contrary to, or an unreasonable application of, established Supreme Court authority. Id. An unreasonable error is one in excess of even a reviewing court's perception that "clear error" has occurred. Lockyer v. Andrade, 538 U.S. 63, 75-76, 123 S. Ct. 1166, 1175 (2003). Moreover, the established Supreme Court authority reviewed must be a pronouncement on constitutional principles, or other controlling federal law, as opposed to a pronouncement of statutes or rules binding only on federal courts. Early v. Packer, 123 S. Ct. at 366.

However, where the state courts have not addressed the constitutional issue in dispute in any reasoned opinion, the federal court will independently review the record in adjudication of that issue. "Independent review of the record is not de novo review of the constitutional issue, but rather, the only method by which we can determine whether a silent state court decision is objectively unreasonable." Himes v. Thompson, 336 F.3d 848, 853 (9th Cir. 2003).

In reviewing a state court's summary denial of a habeas petition, the court "looks through" the summary disposition to the last reasoned decision. Shackleford v. Hubbard, 234 F.3d 1072, 1079 n.2 (9th Cir. 2000) (citing Ylst v. Nunnemaker, 501 U.S. 797, 803-04, 111 S.Ct. 2590 (1991)).

In evaluating the claims raised in the instant petition, the California Court of Appeal did not apply federal standards. "The state court need not cite or even be aware of the governing Supreme Court cases, 'so long as neither the reasoning nor the result of the state court decision contradicts them.'" Powell v. Galaza, 328 F.3d 558, 563 (9th Cir. 2003), quoting *Packer*, 537 U.S. at 8, 123 S. Ct. at 365. Accordingly, this court considers whether the opinion of the California Court of Appeal in denying petitioner's claims was contrary to or an unreasonable application of clearly established Supreme Court authority.

III. Background

The opinion of the California Court of Appeal contains a factual summary. After independently reviewing the record, the court finds this summary to be accurate and adopts it below.

> Defendant Kristi Lyn Lunbery's husband was shot and killed in 1992. The case remained unsolved until 2001 when it was reopened and defendant confessed to killing him. A jury convicted her of second degree murder (Pen.Code, § 187, subd. (a)) and found she personally used a firearm in the commission of the offense. (Pen.Code, § 12022.5, subd. (a).) The trial court sentenced her to a total prison term of 19 years to life.
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> A. The Prosecution's Case
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> In April 1992, defendant, her husband Charley Bateson (Bateson), the victim in this case, and their two young daughters lived in a house on Fir Street in Burney.

The family had moved into the house the previous month. Bateson owned a 30-30 Winchester Model 94 rifle with a lever action that defendant's grandmother had given him as a gift. He kept the rifle in its case in a closet at their prior residence on Ash Street. However, his father saw it in Bateson's truck the week before Bateson's death.

Belinda Strickland had been a neighbor of the Bateson family at their prior residence on Ash Street and was defendant's friend. At 11:47 a.m. on April 17th, Strickland received a collect telephone call from defendant, who said she was at the Mt. Shasta Mall in Redding, that she had a flat tire, Bateson was not answering the telephone, and she wanted Strickland to go over to defendant's house and wake up Bateson so he could help her. Strickland drove over to the Bateson residence, knocked on the front door, and then yelled at the window. Receiving no response, she entered the house through the unlocked front door. She heard a radio coming from the bedroom. The door to the bedroom was closed, so she opened it and found Bateson lying in the bed with the blankets pulled up to his neck. He appeared to be dead. Without entering the room or touching anything, she went to a nearby house and asked someone to call the police. She then drove to Bateson's parents' house and told them he was dead. Strickland continued to socialize with defendant but they never spoke about Bateson's death.

Detective Clemens contacted defendant at the Mt. Shasta Mall where she was waiting with her two children, her grandfather, Francis Conley, and her grandmother, Ethyl Miles. She became visibly upset when told her husband was

dead. The group walked to defendant's car in the mall parking lot. The left front tire was flat. There was glass on the ground by the tire and a piece of glass was imbedded in the tread.

Defendant went to the sheriff's office where Detective Clemens and another officer interviewed her. She told the officers that Bateson worked the swing shift at a lumber mill and that he finished working that morning at 3 a.m. When he arrived home, he woke defendant up and they briefly chatted before he joined her in the hide-a-bed in the living room where they slept.

Defendant and the children awoke about three hours later around 6:30 a.m. Bateson spoke to them for a short time and defendant told him she and the children were going shopping in Redding. He asked her to set the alarm for 11:30 a.m. and told her he was going to change the lock on the front door. He then moved to the children's bedroom to sleep. Defendant set the alarm, put it in the bedroom, and closed the door. She left a note for Bateson on the refrigerator just to remind him of what she had told him. She did not lock the front door because she generally did not lock it when Bateson was home.

Defendant left the house with the two children about 8:00 a.m. First, they went to her parents' house in Burney to drop off the dog. Her grandfather, who was staying in the house while he visited the family, told defendant he was also going to Redding. Defendant and the children then proceeded to the mall where she parked her car. When she returned to the car after shopping, she discovered she had a flat tire and tried to call Bateson but he did not answer the telephone. Thinking she may

have turned off the ringer on the telephone so he could sleep, she called Strickland and asked her to go wake up Bateson so he could help her with her tire. When she saw her grandfather in the mall, he agreed to wait with her.

Defendant explained to the officers that the lock on the front door of her house needed to be changed because the night before, when she got home around 6:15 p.m., about an hour and a half after Bateson had left to go to work, she found the front door unlocked and all the lights turned on. When she called Bateson at work, he told her he had left the door locked and the lights out. Defendant told the officers she thought her other grandmother, Margaret Beaman, had changed the lock when they moved into the house about two weeks before because the "people ... who used to live there" kept driving by the house. Beaman had evicted those people because she believed, based on the large number of brief visitors to the house, that they "did drugs." The boyfriend of the woman who lived there would drive by and "stare" at defendant and her family.

Defendant informed the officers that Bateson owned a rifle that he used for deer hunting. She claimed not to have seen it since their recent move and did not believe Bateson kept it in his truck. Defendant claimed she and Bateson had no major problems and that things were "pretty smooth" between them. When asked about financial problems, defendant said she and Bateson were a couple of payments behind in certain things. Defendant believed Bateson's life insurance policy had lapsed. She agreed to allow the officers to search her car, which when searched contained no weapons or evidence of blood stains. The

officers did not see any blood on defendant's clothing or person either.

Meanwhile, Shasta County Sheriff's Sergeant Wooden, who was in charge of the crime scene investigation, went to the house where he found Bateson in a back bedroom, lying on his back in a child-sized bed covered with cartoon motif sheets, wearing only his undershorts. He had suffered one gunshot wound to the head, which was the cause of death.

The location and pattern of the fragments found from Bateson's skull, the bullet, and blood spatters on the floor, bedroom wall, door jam, and hallway just outside the bedroom door indicated that the bullet was fired from a high velocity rifle like a 30-30 and that the door to the bedroom was partly open when the gun was fired. Gunpowder marks on the pillow beneath Bateson's head indicated the muzzle of the gun was within four to six inches of his head when it was fired. According to Sergeant Wooden, the shooter may or may not have been splattered with blood and skull fragments.

A note on the refrigerator door in the kitchen read: "Hon, we ran down to Redding for a few more groceries and to look at a few things in the Target ad. I'll bring something home for dinner. Love, your three girls. P.S. Be back around 1:00 or so."

There was no evidence of forced entry or ransacking of the house and no evidence that someone tried to clean up the blood in the home or tried to clean it from his or her person. No firearm or expended shell casings were found in the house.[2]

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[2] 2 To eject an expended casing from a lever action rifle

Fingerprints and one palm print were lifted from the front and bedroom doors. A number of them belonged to Bateson and defendant, and one belonged to Strickland.

The bullet and jacketing removed from Bateson's body and the bullet fragments recovered from the crime scene were .30 caliber. The marks on the jacketing were consistent with the conclusion the bullet was fired from a Winchester Model 94 30-30 rifle, which fires .30 caliber bullets. That model was the most common rifle that could have made the marks, although they could have been made by 27 different types of weapons.

In 2001, Shasta County Sheriff's Detective Grashoff was assigned to reevaluate Bateson's death. On December 20, 2001, Detective Grashoff and Blankenship went to defendant's residence. She had been previously notified that they wanted to speak with her and consented to the interview. The detectives identified themselves, informed defendant of their cold case investigation and she invited them inside. During the interview, defendant initially reiterated the version of events she had related to detectives in 1992, with a few changes. She now recalled the lock on the front door had not been changed and the prior tenants may have had a key. She indicated that while she probably did not lock the door when she left the house the morning of Bateson's death, she was not concerned about leaving him in the house with an unlocked door. However, when she learned he had been shot, her first thought was to suspect her grandmother's former tenants because

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of the type owned by Bateson, the lever must be pulled to load another bullet into the firing chamber. (Footnote in opinion)

they were "into drugs" and had told her grandmother at the time she evicted them that "she would pay." Defendant told the detectives that "the guy that used to live there ... resembled [Bateson]."

Defendant further stated that she had known her current husband, Troy Lunbery, since 1985. During the period between 1985 and 1988, she and Bateson broke up for a period and she dated Lunbery before he went into the army. She did not reconnect with him until after Bateson's death in May 1992. Defendant also told the detectives she received about $15,000 from a life insurance policy that Bateson had through his job. About $4,000 or $5,000 of it went to pay funeral expenses.

Towards the end of the interview, after confronting defendant with a secret witness tip, an FBI profile on the case, and the inconsistencies in her story, the detectives told her they knew she did it, they just wanted to know why. Urging her to tell the truth, the detective asked her if she shot Bateson, and she responded "yes." She explained that he was asleep when she shot him and the bedroom door was already open. She recalled that Bateson's rifle was in the closet and must have been loaded, because she did not remember loading it. She remembered putting it in the car after she shot him and driving around a lot, but she did not remember what she did with the rifle. She did not plan the shooting. It was a spur of the moment thing. She and Bateson had just argued about car insurance and a bounced check before he went to sleep. However, she admitted that her call to Strickland may have been part of "a plan for her to find [Bateson]."

Upon further inquiry, defendant explained that she shot Bateson because she did not like the way he talked to her, that he was so controlling, that no one could say "hi" to her without it causing an argument or arousing "suspicion that [she] was sleeping with them...." She was "very stressed" at the time of the shooting because they were living in a small house, she was trying to take care of a three-month-old and a three-year-old, finances were tough, they lived paycheck to paycheck, and Bateson was "controlling." He would tell her "what [she] could and could not do...." He "shut [her] off from everyone" and "grabbed" her by her arms "several times," leaving bruises.

Defendant told the detectives she "just wasn't thinking right" when she shot Bateson, explaining that "if you do something like that, you're not thinking straight. I have grown a lot in the last nine years." She would "never do something like that now. And that, even doing something like that then, that's not me. That is not in me. So, I obviously was not thinking straight. I mean, I couldn't have been."

Darci Hayes, who had been defendant's best friend since the first grade, testified that they often confided in each other and discussed their relationships with the men in their lives. In 1991, the two friends saw a movie entitled "Mortal Thoughts." After seeing the movie, they had a private running joke that Darci considered to be "wives venting" about things their husbands did that irritated them. The joke began during telephone conversations after they were both married with children and before Bateson's death. The joke was whether you would ever kill your significant other if you could get away with it. It was similar to the plot of the movie.

During one such conversation between defendant and Hayes, defendant complained about Bateson asking her where she was going whenever "she would get up to leave a room."

Hayes moved away from Burney in 1987. However, when she returned for Bateson's funeral, the first thing defendant said to her when they were alone was "[d]on't ever tell anyone we talked about that movie." This was the first and only time defendant made such a comment and was the last time she ever mentioned the movie. This comment was a reference to the movie "Mortal Thoughts."

B. The Defense

Defendant testified on her own behalf. She denied killing Bateson, removing a gun from the house the morning of April 17, 1992, or having any knowledge of the killing. She never had any exposure to firearms when she was growing up and never fired a gun. She denied seeing Bateson's rifle after they moved to Fir Street.

Defendant's testimony concerning the events surrounding the shooting was consistent with her 1992 interview. When her grandmother Miles appeared at the mall the morning of April 17th, and told defendant that Bateson had been shot, defendant fainted. She remained very upset and emotional in the aftermath of Bateson's death, spending most of her time in bed.

Defendant first met Bateson when she was in the eighth grade. When she graduated from high school, she attended Shasta College for about a half a semester. She wanted to study early childhood education and hoped to work with kids at a

preschool. Defendant loved Bateson, they had a good relationship during the marriage, and he was a good father. They had no significant problems. He was not physically abusive or controlling. They had plans to buy their own house and raise their children. Defendant's grandmother allowed them to move into her house on Fir Street rent free so they could save money for a down payment on a house.

Defendant testified that when the detectives interviewed her in 2001 she felt stressed but tried her best to help them out and to remember what she could. During the first part of the interview, the officers were "laid back and friendly," gathering details for their investigation. However, at some point, the detective told her they suspected her. While she told them she did not do it, they continued to accuse her. She became scared, nervous and overwhelmed. When the detective implored her to tell the truth for the sake of her children, his body language changed and he became more intense. She became scared because she did not know what he could do. She falsely confessed to shooting Bateson because she believed that is what the detectives wanted to hear, and as soon as she admitted shooting him, the detective's demeanor and tone changed. She thought she needed to give the detectives some information to get them to leave her house, so she falsely told them Bateson was controlling and abusive because they had already suggested that as a possible motive.

Defendant denied ever seeing the movie "Mortal Thoughts," having a running joke with Darci Hayes about that movie, or telling her that Bateson was overly possessive or concerned about her whereabouts. Defendant also denied telling

> Hayes at the time of the funeral not to mention the movie.
>
> Many of defendant's family and friends testified to her passive, calm, gentle, sweet, caring and patient character, which in their opinion was completely inconsistent with someone who would shoot her husband.

(Pet., Ex. A (Opinion) at 2-11.)

IV. Petitioner's Claims

A. Ineffective Assistance of Counsel

Petitioner's first claim is that her trial counsel rendered ineffective assistance by failing to present expert testimony explaining why a person would confess to a crime she did not commit. (Pet. at 11.) Petitioner states that her trial counsel had retained an expert to explain to the jury that "innocent people do in fact confess to crimes they do not commit," but that he failed to call this expert as a witness. (Id.) She claims that this failure "constituted ineffective assistance of counsel and denied petitioner the only defense she had." (Id.)

This claim was raised for the first time in a petition for writ of habeas corpus filed in the California Supreme Court. (Respondents' Lodged Doc. No. 7.) The Supreme Court summarily denied the petition by order dated June 18, 2007. (Respondents' Lodged Doc. No. 8.) Under these circumstances, this court will independently review the record to determine whether the state court decision is objectively unreasonable. Himes, 336 F.3d at 853.

1. Legal Standards

The Sixth Amendment guarantees the effective assistance of counsel. The United States Supreme Court set forth the test for demonstrating ineffective assistance of counsel in Strickland v. Washington, 466 U.S. 668 (1984). To support a claim of ineffective assistance of counsel, a petitioner must first show that, considering all the circumstances, counsel's performance fell below an objective standard of reasonableness. Id. at 687-88. After a petitioner identifies the acts or omissions that are alleged not to have been the result of reasonable professional judgment, the court must determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally, competent assistance. Id. at 690; Wiggins v. Smith, 539 U.S. 510, 521 (2003). In assessing an ineffective assistance of counsel claim "[t]here is a strong presumption that counsel's performance falls within the 'wide range of professional assistance.'" Kimmelman v. Morrison, 477 U.S. 365, 381 (1986) (quoting Strickland, 466 U.S. at 689). There is in addition a strong presumption that counsel "exercised acceptable professional judgment in all significant decisions made." Hughes v. Borg, 898 F.2d 695, 702 (9th Cir. 1990) (citing *Strickland*, 466 U.S. at 689).

Second, a petitioner must establish that he was prejudiced by counsel's deficient performance. Strickland, 466 U.S. at 693-94. Prejudice is found where "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694. A reasonable probability is "a probability sufficient to undermine confidence in the outcome." Id. See also

Williams, 529 U.S. at 391-92; Laboa v. Calderon, 224 F.3d 972, 981 (9th Cir. 2000). A reviewing court "need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies . . . . If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice . . . that course should be followed." Pizzuto v. Arave, 280 F.3d 949, 955 (9th Cir. 2002) (quoting Strickland, 466 U.S. at 697).

Defense counsel has a "duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." Strickland, 466 U.S. at 691. "This includes a duty to . . . investigate and introduce into evidence records that demonstrate factual innocence, or that raise sufficient doubt on that question to undermine confidence in the verdict." Bragg v. Galaza, 242 F.3d 1082, 1088 (9th Cir. 2001) (citing Hart v. Gomez, 174 F.3d 1067, 1070 (9th Cir. 1999)). In this regard, it has been recognized that "the adversarial process will not function normally unless the defense team has done a proper investigation." Siripongs v. Calderon (Siripongs II), 133 F.3d 732, 734 (9th Cir. 1998) (citing Kimmelman, 477 U.S. at 384). Therefore, counsel must, "at a minimum, conduct a reasonable investigation enabling him to make informed decisions about how best to represent his client." Hendricks v. Calderon, 70 F.3d 1032, 1035 (9th Cir. 1995) (quoting Sanders v. Ratelle, 21 F.3d 1446, 1456 (9th Cir. 1994) (internal citation and quotations omitted)). On the other hand, where an attorney has consciously decided not to conduct further investigation because of reasonable tactical evaluations, his or her performance is not constitutionally deficient. See Siripongs II, 133 F.3d

at 734; Babbitt v. Calderon, 151 F.3d 1170, 1173 (9th Cir. 1998); Hensley v. Crist, 67 F.3d 181, 185 (9th Cir. 1995). "A decision not to investigate thus 'must be directly assessed for reasonableness in all the circumstances.'" Wiggins, 539 U.S. at 533 (quoting Strickland, 466 U.S. at 691). See also Kimmelman, 477 U.S. at 385 (counsel "neither investigated, nor made a reasonable decision not to investigate"); Babbitt, 151 F.3d at 1173-74. A reviewing court must "examine the reasonableness of counsel's conduct 'as of the time of counsel's conduct.'" United States v. Chambers, 918 F.2d 1455, 1461 (9th Cir. 1990) (quoting Strickland, 466 U.S. at 690). Furthermore, "'ineffective assistance claims based on a duty to investigate must be considered in light of the strength of the government's case.'" Bragg, 242 F.3d at 1088 (quoting Eggleston v. United States, 798 F.2d 374, 376 (9th Cir. 1986)).

2. Merits of Petitioner's Claim

Petitioner had two trial counsel: Jeffrey Jens and Jeffrey Gorder. Prior to trial, Mr. Jens retained Dr. Richard Ofshe, an expert in the field of coercive police interrogation techniques and the phenomenon of false or coerced confessions. (Pet., Ex. C.) After meeting with petitioner, Dr. Ofshe concluded that petitioner's confession was not "the product of the use of psychologically coercive interrogation tactics." (Pet., Ex. B.) However, notwithstanding this conclusion, he opined that petitioner may have confessed falsely as a reaction to the stress of the occasion. (*Id.*) Dr. Ofshe made the following observations:

> Ms. Lunbery maintains that she is not responsible for her former husband's death

> and essentially explains her decision to confess as a reaction to the stress of the interrogation in combination with the pressures of the day on which the Detective visited her. Ms. Lunbery is describing a well recognized type of confession — a stress compliant false confession.
>
> This type of false confession comes about when persons who are exceptionally vulnerable to interpersonal pressure and are unable to cope with the intensity of even a non-coercive interrogation are put in a position from which it appears to them that the only way to end the intolerable pressure they are experiencing is to comply with the interrogator's demand for a confession.
>
> * * *
>
> I should mention that given what I know of the case facts, it does not appear that Ms. Lunbery revealed any verifiable information about the crime that suggested that she had actual knowledge of how her former husband was killed, nor does her confession present a particularly plausible account of the crime. The failure of a confession to fit the facts of a crime and the inability of a confessor to supply information that should be known to the perpetrator is a hallmark of a false confession.

(Id.)

Dr. Ofshe advised Mr. Jens to have petitioner evaluated by a psychologist who was familiar with the phenomenon of false confessions in order to determine whether she had the personality attributes that might result in a false confession. (Id.) He told Mr. Jens that a local psychologist could obtain the relevant test on the "web." (Id.) In

response to this advice, Jens consulted with several local psychologists. (Pet., Ex. C.)[3] One of them told Jens that "even if the [test suggested by Dr. Ofshe] were valid and Kristi scored among those considered at risk to be easily manipulated he would need additional corroboration to support any conclusion that Kristi was vulnerable to manipulation techniques." (Id.) This psychologist also "pointed out that such a person should have a history of incidences which factually were based on manipulation." (Id.) With this advice in mind, Mr. Jens interviewed petitioner "and her mother several times and specifically asked about psychological, familial, and peer history to which they have reported there was no prior incidences of manipulation vulnerability." (Id.) Jens ultimately decided not to call Dr. Osfhe as a witness at petitioner's trial. He explained the reasoning behind this decision as follows:

> My evaluation is that for several reasons such testimony would not be admissible in the face of a Kelly-Frye objection. Firstly, the "Gudjohnsson test" is not widely accepted in the medical community. Dr. Ofshe stated that he believed Kristi when she said she didn't kill her husband; but it would be the first case of its nature testified to in a US courtroom based on "Gudjohnsson test". The reliability of any data used to form opinions regarding test results would be no corroboration historically in Kristi's case. . .

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[3] Petitioner contends that "instead of retaining the services of a psychologist who was familiar with the psychological tests relating to the giving of false confessions, defense counsel retained local psychologists who were unfamiliar with this area of psychology." (Pet. at 15.)

> I have discussed all of these details and evidentiary issues with my co-counsel Jeff Gorder and we both have concluded that at this juncture there is a dramatically insufficient basis for Dr. Ofshe's testimony. We have also considered the negative impact an expert can have when his testimony is so lacking in substance. As Dr. Caruso put it: "Kristi's best defense would be her explanation, the jury needs to believe Kristi."

(Id.)

Petitioner's habeas counsel declares that she spoke to Mr. Jens as part of her investigation of petitioner's claim of ineffective assistance of counsel. (Pet., Ex. D.) Jens stated that the decision not to call Dr. Ofshe as a witness was made by Jeffrey Gorder, who actually represented petitioner at trial. (Id.) Habeas counsel subsequently contacted Mr. Gorder, who stated that "he was not involved in making the decision to not call Dr. Ofshe as a witness" and that "by the time he was assigned to the case, the decision not to call Dr. Ofshe was made by Mr. Jens." (Id.)

Dr. Ofshe subsequently wrote a letter to petitioner. He described the testimony he would have given at her trial as follows:

> I could have helped the jury understand that what you were describing is something that is well recognized by those who study interrogation and false confession. I could have helped them understand that since false confessions happen and happen for the reasons you gave, they needed to get past the fact that you said "I did it" and look at the evidence and your lack of knowledge of how the crime happened. This is how they needed to weigh your confession and to decide whether it was a true or false statement.

(Pet., Ex. E.) In declaration provided to habeas counsel, Dr. Ofshe further described what his testimony might have been had he been called to testify at petitioner's trial. (Pet., Ex. F.) In that declaration, he states that petitioner "still must be evaluated by a competent psychologist who is familiar with the use of the Gudjonsson test as a diagnostic instrument for the phenomenon of interrogative suggestibility." (Id.) He states that "had [petitioner] been administered the Gudjonsson test and scored high, I would have testified about false confessions and how to evaluate them." (Id.)

Prior to the filing of the instant habeas petition, petitioner was evaluated by a psychologist who is familiar with the use of the Gudjonsson test. (Pet. at 18.) Taking all of the various test data into consideration, this psychologist concluded that petitioner "has the personality features that made her vulnerable to giving a false confession." (Pet., Ex. G at 7.) However, he noted that petitioner "scored only average in suggestibility" which measures "people who are susceptible to giving erroneous accounts of events when subject to questioning." (Id. at 6.)

Petitioner testified at her trial. She attempted to explain why her confession was false. She also stated that she did not commit the crime. (Lodged Doc. No. 9 at 884-95.) Petitioner's friends and family testified that she was not the type of person who could have committed murder. However, petitioner claims that her trial counsel should also have introduced the testimony of Dr. Ofshee in support of her defense that she falsely confessed to the murder of her husband. She argues that counsel's failure to do so deprived the jury "of critical information it

should have had in evaluating petitioner's case." (Pet. at 21.) She explains:

> Had counsel followed through on Dr. Ofshe's recommendation that further testing be administered on petitioner, to assist in determining the reliability of her "confession," and called upon Dr. Ofshe to testify at petitioner's trial, counsel could have effectively attacked the commonly held belief that people do not confess to murders they did not commit. Trial counsel's representation fell below an objective standard of reasonableness in failing to challenge the confession as false.

(Id. at 22.)

3. Need for Evidentiary Hearing

Petitioner did not make a motion for evidentiary hearing. However, in the petition, she made a *pro forma* request for one, and in the traverse, she made an actual request. Respondent did not reference the need for an evidentiary hearing, but respondent did not object to the post-trial information presented to the California Supreme Court which has been set forth above.

Petitioner does not indicate what else she would like to present at evidentiary hearing, and the court does not know of what else could be presented either. Therefore, the undersigned accepts the post-trial filings herein, and will consider them along with the trial record as a whole. To the extent that it is necessary to expand the federal record with the post-trial filings, it is so ordered. For the reasons set forth below, no evidentiary hearing is necessary.

The ordinary standards under federal law for an evidentiary hearing, which are well known and

well established in the Ninth Circuit, are as follows. "To obtain an evidentiary hearing on an ineffective assistance of counsel claim, a habeas petitioner must establish that (1) his allegations, if proven, would constitute a colorable claim, thereby entitling him to relief and (2) the state court trier of fact has not, after a full and fair hearing, reliably found the relevant facts." Correll v Stewart, 137 F.3d 1404, 1413 (9th Cir. 1998). Nevertheless, the court does not have to hold an evidentiary hearing when the record clearly refutes the collateral factual allegations raised by petitioner. *Schriro v. Landrigan*, __U.S.__, 127 S. Ct. 1933, 1940 (2007). Moreover, Schriro also announced that in determining whether to grant an evidentiary hearing the federal court must apply the AEDPA deferential standards to legal and factual questions necessarily reached by the state courts. Id. Thus, for example, if the reasons for counsel actions were at issue, but under deferential standards, the court could not find prejudice, no evidentiary hearing would be necessary.

One other important caveat exists to the "mandatory" nature of evidentiary hearings, and it is well set forth by Williams v. Woodford, 384 F.3d 567, 590-591 (9th Cir. 2004):

> We have previously held that a district court in a habeas corpus proceeding "need not conduct full evidentiary hearings," but may instead "expand the record ... with discovery and documentary evidence." Watts v. United States, 841 F.2d 275, 277 (9th Cir.1988) (per curiam) (denying a habeas corpus petitioner's contention that the district court erred in resolving a claim based on contradictory affidavits and interrogatories without an evidentiary hearing at which oral testimony could be provided).

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Other circuits have similarly held that "there is a permissible intermediate step that may avoid the necessity of an expensive and time consuming hearing in every [habeas corpus] case. It may instead be *591 perfectly appropriate, depending upon the nature of the allegations, for the district court to proceed by requiring that the record be expanded to include letters, documentary evidence, and, in an appropriate case, even affidavits." Chang v. United States, 250 F.3d 79, 86 (2nd Cir.2001) (finding no abuse of discretion when the district court dismissed the petitioner's claim without an evidentiary hearing with live witnesses) (citing Raines v. United States, 423 F.2d 526, 529-30 (4th Cir.1970)); see also Blackledge, 431 U.S. at 81-82, 97 S.Ct. 1621 ("[A]s is now expressly provided in the Rules Governing Habeas Corpus Cases, the district judge ... may employ a variety of measures in an effort to avoid the need for an evidentiary hearing.... In short, it may turn out ... that a full evidentiary hearing is not required."); Spreitzer v. Peters, 114 F.3d 1435, 1456 (7th Cir.1997) (same).

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However, in construing Blackledge, our circuit and the Second Circuit have found no abuse of discretion when the district court "conclude[d] that [a full evidentiary] hearing would not offer any reasonable chance of altering its view of the facts." Chang, 250 F.3d at 86; Watts, 841 F.2d at 277 (finding that, in the case at hand, the issue of credibility could be conclusively decided on the basis of documentary testimony and evidence in the record).

The undersigned finds that petitioner will receive a fair consideration of her claim by considering the extra-record materials lodged by petitioner, and expanded into this record, supporting her claim.

4. Discussion of Merits

In support of her claim in this regard, petitioner cites United States v. Hall, 93 F.3d 1337 (9th Cir. 1996.) In that case, which involved an appeal of a federal criminal conviction, the appellant claimed that the district court applied an incorrect standard in excluding proffered expert testimony (from Dr. Ofshe) regarding appellant's susceptibility to giving a false confession. The appellate court concluded that the proffered testimony was admissible under the federal rules of evidence. In relevant part, the court made the following observations:

> Dr. Ofshe's testimony, assuming its scientific validity, would have let the jury know that a phenomenon known as false confessions exists, how to recognize it, and how to decide whether it fit the facts of the case being tried. The district court's conclusion therefore missed the point of the proffer. It was precisely because juries are unlikely to know that social scientists and psychologists have identified a personality disorder that will cause individuals to make false confessions that the testimony would have assisted the jury in making its decision. It would have been up to the jury, of course, to decide how much weight to attach to Dr. Ofshe's theory, and to decide whether they believed his explanation of Hall's behavior or the more commonplace explanation that the confession was true. See 18 U.S.C. §

> 3501. But the jury here may have been deprived of critical information it should have had in evaluating Hall's case.
>
> In these circumstances, we cannot conclude that the court's failure to conduct a full Daubert inquiry, applying the correct legal standards under [Federal Rule of Evidence] Rule 702, was harmless error.

Id. at 1345. Although these observations have some applicability to the instant case, the claim raised by petitioner does not concern the admissibility of evidence. Rather, the issue here is whether trial counsel's decision not to present expert testimony regarding false confessions constituted ineffective assistance of counsel.

As described above, Mr. Jens investigated the possibility of calling Dr. Ofshe as a witness. He interviewed Dr. Ofshe and followed up on his advice by contacting several local psychologists. Ultimately, after talking with these psychologists and interviewing petitioner and her mother, either he or Mr. Gorder (or both) decided for tactical reasons not to present this evidence. Mr. Jens believed the evidence was too speculative to be of help to the jury and would not be admissible in any event. (Pet., Ex. C.) He also considered the possible costs of Ofshee's testimony and the failure of petitioner and her family to provide evidence of prior vulnerability to manipulation. (Id.) Defense counsel believed that the best defense strategy was to rely on petitioner's testimony alone to convince the jury that she was innocent and that her confession was false. Counsel's decision not to present the testimony of Dr. Ofshe, based on these considerations, was not unreasonable.[4]

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[4] Dr. Ofshe now states that he would have testified

A trial counsel's reasonable tactical decisions are "virtually unchallengeable." Strickland, 466 U.S. at 690. As the United States Supreme Court has explained,

> strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments.

Id. at 690-91. In addition, "[f]ew decisions a lawyer makes draw so heavily on professional judgment as whether or not to proffer a witness at trial[.]" Alcala v. Woodford, 334 F.3d 862, 871 (9th Cir. 2003) (quoting Lord v. Wood, 184 F.3d 1083, 1095 (9th Cir. 1999)). See also Siripongs II, 133 F.3d at 735 (finding counsel's performance to be based on a reasonable tactical decision when, after hiring an expert and investigating a possible defense, counsel decided it was not credible enough to present to the jury).

Although petitioner's trial counsel did not have petitioner evaluated to determine whether she was susceptible to confessing to a crime she did not

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without remuneration, if asked. Pet., Ex. E. However, defense counsel was not aware of this at the time of petitioner's trial. (Id.)

commit, this court does not find that fact dispositive. Counsel's own investigation revealed that neither petitioner nor her mother could report "prior incidences of manipulation vulnerability." (Pet., Ex. C.) Given this fact, it was not unreasonable for counsel to decline further testing. Moreover, counsel could have been reluctant to expose Dr. Ofshe to cross-examination given the lack of previous examples of petitioner showing such vulnerability and the fact that they could reasonably expect that the state would provide rebuttal experts to confirm foundational problems in Ofshe's testimony. Cf. Williams v. Woodford, 384 F.3d 567, 611 (9th Cir. 2004) ("Moreover, it is 'acceptable trial strategy to choose not to call psychiatrists to testify when they an be subjected to cross-examination based on equally persuasive psychiatric opinions that reach a different conclusion.'"). Applying a "heavy measure of deference" to trial counsel's tactical decision not to call Dr. Ofshe, this court concludes that petitioner has failed to demonstrate counsel's investigation or his performance were outside the range of reasonable professional assistance.

The undersigned understands that the testimony of the defendant herself regarding her vulnerability to manipulation in stressful situations could readily be viewed as self-serving, and in need of corroboration. However, it was up to the attorney to determine whether the corroboration to be given by the expert was more problematic than salutary. The fact that one can argue in hindsight, especially after the verdict and in light of petitioner's present day evidence, that petitioner might have been better off with the expert testifying after all, does not constitute grounds to find counsel unreasonable.

Because the undersigned has found that counsel did not act unreasonably, there is no need for the court to determine prejudice or lack thereof by an exhaustive analysis of the extra-record evidence.

For the foregoing reasons, the decision of the California Supreme Court rejecting petitioner's claim of ineffective assistance of counsel is not contrary to or an unreasonable application of Strickland. Accordingly, petitioner is not entitled to relief on this claim.

B. Evidence of Third Party Culpability

Petitioner claims the trial court violated her constitutional right to present a defense when it excluded her proffered evidence of third party culpability. (Pet. at 23.) The California Court of Appeal fairly described the background to this claim as follows:

> In response to the People's motion to exclude evidence of third party culpability, defendant proffered the following items of evidence:
>
> (1) Margaret Beaman, defendant's grandmother, was the owner of the Fir Street residence where the killing occurred. A short time before defendant and Bateson moved into that residence, it was occupied by Cynthia Ellis and her ex-husband Frank Delgado, a known drug dealer. After Ellis and Delgado moved in, Ms. Beaman noticed an increase in traffic to and from the house at all hours of the day and night in a relatively rural area, consistent with drug sales, and she evicted them because of that activity.
>
> (2) A confidential informant (CI) told Shasta County Sheriff's Detective Willie

Cox on April 20, 1992, that the killing of Bateson was a mistake and that the intended victim was Frank Delgado because Delgado had "ripped off several people in town over drug dealings."

(3) Finger and palm prints were lifted from the murder scene that did not match any of the exemplars from people who would have been in the residence in the recent past.

(4) On April 16, 1992, defendant returned home to find the front door unlocked even though Bateson was at work. Because this was a very unusual situation, she called him at work because she was concerned about this.

(5) At approximately 3:30 a.m. on April 16th, a neighbor who lived across the street from the Bateson residence saw a dilapidated Ford Fiesta drive down Fir Street, make a u-turn at the dead-end, park in front of the Bateson residence for 20 to 30 seconds, and then drive away at a fast rate of speed. A CI told Detective Cox that Delgado and at least one of Delgado's acquaintances from the drug-world were associated with that vehicle.

(6) Two weapons not connected to defendant could not be ruled out as the murder weapon.

(7) When Ms. Beaman evicted Delgado, he told her "she would be sorry."

(8) Oney Rhoades, an acquaintance of Delgado's, had stayed at the Fir Street house with Delgado in late February and saw Delgado and Henry Garza in possession of a flask of dope worth $ 40,000.

(9) A Sheriff's sergeant told a detective that Bateson bore a strong resemblance to an individual who had recently been

> employed as an undercover agent who had attempted to buy drugs from Delgado and others.
>
> (10) Rory Keim told the police that he and some friends were in a restaurant discussing Bateson's death when Henry Garza, who was sitting nearby, approached them and said "[t]hat's a bummer, my partners blew away the wrong dude." At the time of the offer of proof, Garza was deceased.
>
> The court granted the People's motion to exclude this evidence. The court based its ruling on its conclusions that inadmissible hearsay cannot form the basis for third-party culpability evidence, there was an insufficient showing under Hall, supra, 41 Cal.3d 826, and the evidence was inadmissible under Evidence Code section 352 because it had slight probative value, was prejudicial to the prosecution, would be very time consuming, was likely to mislead and confuse the jury, and was insufficient to raise a reasonable doubt of defendant's guilt. The court advised counsel however, that he could inquire into exculpatory fingerprint or firearm evidence in order to give evidentiary weight to defendant's claim she did not commit the murder.

(Opinion at 12-14.)

The California Court of Appeal rejected petitioner's claim that the trial court violated her constitutional right to present a defense when it excluded the above-described evidence. The court found that "the evidence showed nothing more than that a third party had a motive and opportunity to commit the offense and therefore the evidence failed to meet the threshold under People v. Hall (1986) 41

Cal.3d 826 (Hall)." (Id. at 12.) The appellate court explained its reasoning as follows:

> We review the trial court's ruling for abuse of discretion, which we may find only if the ruling exceeded the bounds of reason, considering all the circumstances. (citations omitted.)
>
> The admissibility of third-party culpability evidence is governed by the same rules governing the admissibility of other evidence. It is admissible if it is relevant to raise a reasonable doubt of the defendant's guilt (Evid.Code, § 350) and its probative value is not substantially outweighed by the risk of undue delay, prejudice, or confusion. (Evid.Code, § 352; Hall, supra, 41 Cal.3d at p. 834; People v. Bradford (1997) 15 Cal.4th 1229, 1325.) In determining the probative value, the Supreme Court has held that "evidence of mere motive or opportunity to commit the crime in another person, without more, will not suffice to raise a reasonable doubt about a defendant's guilt: there must be direct or circumstantial evidence linking the third person to the actual perpetration of the crime." (Hall, supra, 41 Cal.3d at p. 833.)
>
> The only real evidence directly or circumstantially linking someone other than defendant to the murder is Rory Keim's statement that Henry Garza said his partner killed the wrong man. However, as the trial court correctly noted, inadmissible hearsay statements cannot form the basis for a third party culpability defense. (People v. Bradford, supra, 15 Cal.4th at pp. 1324-1325.) Defendant claims this evidence is admissible as a statement against penal interests because Garza knew it was his crime partner who

committed the homicide and that the offense was a case of mistaken identity. Respondent contends the trial court correctly concluded this statement was not against Keim's penal interest because he did not admit, and implicitly denied, playing any personal role in the murder. We agree with respondent that Keim's statement was properly excluded.

Because Keim's statement was offered for its truth, it is hearsay. (Evid.Code § 1200, subd. (a); People v. Duarte (2000) 24 Cal.4th 603, 610.) A hearsay statement made against the declarant's penal interest is admissible under Evidence Code section 1230, which provides in pertinent part: "Evidence of a statement by a declarant having sufficient knowledge of the subject is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness and the statement, when made, ... so far subjected him to the risk of ... criminal liability ... that a reasonable man in his position would not have made the statement unless he believed it to be true."

When proffering such evidence, "the proponent of such evidence must show that the declarant is unavailable, that the declaration was against the declarant's penal interest when made and that the declaration was sufficiently reliable to warrant admission despite its hearsay character." (People v. Duarte, supra, 24 Cal.4th at pp. 610-611.)

The offer of proof indicates that Keim spoke to Detective Compomizzo on May 6, 1992, and told him that he and some friends were recently at a pizza parlor discussing Bateson and his death. Garza, who was sitting a few tables away, approached them and said "[t]hat's a

bummer, my partners blew away the wrong dude."

The requirement of unavailability was met because Garza was deceased at the time the evidence was proffered. However, Garza's statement did not satisfy the second and third requirements of the hearsay exception. It was not against his penal interest because it did not implicate him in the commission of the murder and his use of the words "my partners" did not establish he used that term to mean his partners in committing the Bateson murder or any other offense. Additionally, the statement lacks sufficient indicia of reliability. Garza made the statement to Keim and Keim's friends in a pizza parlor after eavesdropping on their conversation. According to the detective's report, Keim stated that Garza was "drinking and arguing" with some other people when he made this statement.[5] The statement may have been nothing more than boasting or the mindless remark of someone under the influence of alcohol. Additionally, the report states that Garza "did not indicate any names or how the shooting took place." Thus, there is no indication he had personal knowledge of the murder. Indeed, his statement may have been based on multiple levels of hearsay. The statement was therefore inadmissible.

The remaining items of proffered evidence are also inadmissible. At best, some of the evidence showed that Frank Delgado or

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[5] [footnote in text of opinion] This report was submitted to the trial court in connection with another matter at approximately the same time the motion to exclude the third-party culpability evidence was made and therefore was before the court when it ruled on the People's motion to exclude the third-party culpability evidence.

> others may have had a motive and/or the opportunity to murder Bateson, either in revenge for being evicted or as the unintended victim in a case of mistaken identity (items 1, 2, 4, 5, 7.) As such, the evidence was inadmissible because it lacked sufficient probative value to raise a reasonable doubt of defendant's guilt under Hall, supra, 41 Cal.3d at page 833. Likewise, the fingerprint and weapons evidence had little probative value (items 3, 6),[6] the CI's statement was inadmissible hearsay (item 5) (Evid.Code. § 1200, subd. (a)), and the evidence that Delgado was involved with drugs was inadmissible character evidence. (item 8) (Evid.Code, § 1101; People v. Adams, supra, 115 Cal.App.4th at p. 253.)[7]

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[6] [footnote in text of opinion] The fingerprint and palm print evidence only established that other people had been in the house. Since defendant and her family had only lived in that house for approximately two weeks, the presence of other prints is not surprising. Similarly, the fact two other weapons could not be ruled out as the murder weapon, does not constitute direct or circumstantial evidence linking someone else to the offense.

[7] [footnote in text of opinion] Much of this evidence was nevertheless introduced into evidence by way of defendant's tape-recorded interviews and expert testimony. Defendant told detectives that her grandmother, Ms. Beaman, evicted Ellis and Delgado because of apparent drug dealing and that one of them told her she would "pay" for evicting them (items 1 and 7), that those people continued to drive by the house and stare at defendant and her family (item 6), that the day before the killing defendant returned to the house and found the door unlocked and the lights on suggesting that someone might have gained access to the house that day (item 4), and that the man who used to live in the house looked like Bateson (item 9). Expert testimony showed there were unidentified fingerprints in the house and an unidentified palm print on the bedroom door molding while the firearm expert acknowledged that several types of firearms other than Bateson's missing rifle

> Defendant did not proffer any admissible direct or circumstantial evidence linking anyone other than defendant to the actual murder, such as blood stained clothing, identifiable fingerprints, palm prints, or shoe prints, or eye witness testimony that someone other than defendant was seen entering or exiting the Bateson residence during the early morning of April 17, 1992. (See People v. Alcala (1992) 4 Cal.4th 742, 793.) The fact someone saw a Ford Fiesta at 3:30 a.m. the morning before the murder was not probative. It remained there for only 20 to 30 seconds and no one was seen exiting or entering the car at that time. Accordingly, because the proffered evidence was insufficient to raise a reasonable doubt about defendant's guilt, the trial court did not abuse its discretion in excluding it.

(Opinion at 14-19.)

Due process includes a criminal defendant's right to "a meaningful opportunity to present a complete defense." Crane v. Kentucky, 476 U.S. 683, 690 (1986) (citation and internal quotations omitted). Evidence rules violate this right if they "infring[e] upon a weighty interest of the accused and are arbitrary or disproportionate to the purposes they are designed to serve." Holmes v. South Carolina, 547 U.S. 319, 324 (2006) (citation and internal quotations omitted). Nevertheless, trial judges have "'wide latitude' to exclude evidence that is 'repetitive ..., only marginally relevant' or poses an undue risk of 'harassment, prejudice, [or] confusion of the issues.'"

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could have been the murder weapon (items 3 and 6). Additionally, the defense introduced evidence that the crime scene investigator found unidentified footprints in a wooded area near the house.

Crane, 476 U.S. at 689-90, (quoting Delaware v. Van Arsdall, 475 U.S. 673, 679 (1986)).

Evidence of potential third-party culpability must be admitted when, under the "facts and circumstances" of the individual case, its exclusion would deprive the defendant of a fair trial. Chambers v. Mississippi, 410 U.S. 284, 303 (1973). The Court of Appeals for the Ninth Circuit has determined that where the proffered evidence simply affords a possible ground of suspicion pointing to a third party and does not directly connect that person with the actual commission of the offense, that evidence may be excluded. See People of Territory of Guam v. Ignacio, 10 F.3d 608, 615 (9th Cir. 1993) (citing Perry v. Rushen, 713 F.2d 1447, 1449 (9th Cir. 1983)). Under California law, a criminal defendant has a right to present evidence of third party culpability if it is capable of raising a reasonable doubt regarding his own guilt. See Spivey v. Rocha, 194 F.3d 971, 978 (9th Cir. 1999) (citing *People v. Hall,* 41 Cal. 3d 826 (1986)). In order for evidence pointing to another suspect to be admissible, however, "there must be direct or circumstantial evidence linking the third person to the actual perpetration of the crime." Hall, 41 Cal. 3d at 833. Motive or opportunity is not enough. Id.[8]

As discussed above, the California Court of Appeal found the proffered evidence of third-party culpability inadmissible because it was unreliable, lacked sufficient probative value to raise a reasonable doubt of petitioner's guilt, and was based, in part, on inadmissible hearsay and character evidence. (Opinion at 18.) These conclusions are not

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[8] In Holmes, the Supreme Court noted that rules such as that set forth in Hall are "widely accepted." 547 U.S. at 327 n.*.

unreasonable. At most, the evidence affords a possible ground of suspicion pointing to several third parties and does not directly connect any person with the actual commission of the offense. Speculative rumors about the reason for Bateson's murder, the identity of other potential suspects, or the possibility that the killing was accidental, would not have been sufficient to change the outcome of petitioner's trial. Further, as noted by the state appellate court, much of the evidence excluded by the trial court was introduced into evidence by other means. (Id. at 18 n.4.)

Neither the California rule of evidence requiring sufficient evidence linking the third person to the crime, nor its application by the trial court in this case, constitutes a due process violation. Therefore, the appellate court's decision did not involve an unreasonable application of clearly established federal law. See Holmes, 547 U.S. at 319, 327 (acknowledging the right of a state court to exclude defense evidence that is too "remote [or] lack[s] such connection with the crime" to raise a reasonable doubt as to the accused's guilt). Accordingly, petitioner is not entitled to relief on this claim.

C. Trial Court's Failure to Impose Sanctions on Prosecution

Petitioner's next claim is that her rights to a fair trial and to present a defense were violated by the failure of the trial court to impose appropriate sanctions on the prosecution for failure to preserve information regarding the identity of a confidential informant. The California Court of Appeal fairly described the background to this claim as follows:

An investigative report summarized the statement made by a CI to Detective Cox in 1992. The report states that the CI told Cox he knew Bateson, that the CI "felt the murder was a mistake" and the "CI thought Frank Delgado was supposed to have been killed." The CI explained that it was about drugs and that Delgado had "ripped off several people in town over drug dealings." The CI noted that Delgado had usually slept until the afternoon in the same bedroom where Bateson was killed, and along with Henry Garza, was associated with a white Ford Fiesta with reddish orange stripes. The CI identified three people who could "possibly" have murdered Bateson believing he was Delgado: (1) the brother of Cindy Ellis, whose name the CI did not know, but who did not get along very well with Delgado, (2) Ellis's current boyfriend, Les, who had a feud with Delgado over Ellis and drugs, or (3) someone associated with Henry Garza, who Delgado suspected of working for the police, such as Rhodes or the Lagoo families.

Defendant filed a pretrial motion for disclosure of the identity of the CI. The prosecutor opposed the motion asserting that he did not know the CI's identity and it was no longer known to law enforcement. Additionally, the prosecutor argued that it appeared the CI did not have any personal information and that his information was a matter of pure speculation as if "someone walked off the street and gave a bunch of theories about what had happened . . . ."

When the court asked defense counsel why he had not contacted Garza and Delgado, counsel advised the court that he had made fruitless attempts to do so. Counsel

asked for a hearing on law enforcement's reasonable attempts to preserve the CI's name and address and that it would move for sanctions, depending on the outcome of that hearing.

Nevertheless, the court held a hearing at which Captain Cox testified. Cox confirmed he had no current recollection of the CI's identity, that he unsuccessfully searched his files for his notes, and he had no way to obtain the information. He testified that his office investigated the possibility that Bateson's murder was the result of mistaken identity, that at the time the CI provided the information to him, he considered it important to the investigation, but he "absolutely" denied doing anything to "intentionally destroy information that would lead to the identify of this informant . . . ."

Characterizing the failure to preserve the CI's identity as "negligence," defense counsel requested that the court dismiss the charges against defendant as an appropriate sanction. In the alternative, he requested that the court admit as evidence the CI's hearsay statements or instruct the jury that the defense was unable to contact the individual who might have had information.

Finding the information in the report pure speculation on the part of the CI, the court denied the motion and declined to impose any sanctions on the prosecution.

At trial, the defense renewed its request for evidentiary or instructional sanctions. Counsel advised the court he was not arguing that Cox acted in bad faith. The court impliedly denied the request.[9]

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[9] [footnote in text of opinion] The matter was heard at

(Opinion at 23-25.)

The California Court of Appeal concluded that petitioner's claim in this regard should be denied because petitioner failed to show the prosecution acted in bad faith or that she was prejudiced by the loss of the evidence. The appellate court reasoned as follows:

> In California v. Trombetta (1984) 467 U.S. 479 [104 S. Ct. 2528, 81 L.Ed.2d 413], law enforcement failed to preserve the defendant's breath samples used to determine blood-alcohol level in prosecutions for driving under the influence of alcohol. The court found California's policy of not preserving breath samples does not violate a defendant's due process rights. The duty to preserve evidence is "limited to evidence that might be expected to play a significant role in the suspect's defense. To meet this standard of constitutional materiality, [citation], evidence must both possess an exculpatory value that was apparent before the evidence was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means." This standard was not met where the "chances were extremely low that the samples would have been exculpatory" and the defense could still attack the reliability of the breath tests. (Id. at pp. 488-489 [at p. 422-423], fn. omitted.)
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> In Arizona v. Youngblood (1988) 488 U.S. 51 [102 L.Ed.2d 281] (Youngblood), the state court reversed the defendant's

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the same time as the motion to exclude third-party culpability evidence. Although the court granted the prosecution's motion to exclude, it did not expressly rule on the defense request for sanctions.

convictions for child molestation, sexual assault, and kidnapping, because state officials failed to preserve semen samples from the victim's body and clothing. Defendant raised a mistaken identity defense. Reversing the state court's decision, the high court held "that unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law." (Id. at p. 58 [at p. 289], italics added.)

The court in Youngblood reasoned that "[t]he Due Process Clause of the Fourteenth Amendment, as interpreted in *Brady*[10] makes the good or bad faith of the State irrelevant when the State fails to disclose to the defendant material exculpatory evidence. But we think the Due Process Clause requires a different result when we deal with the failure of the State to preserve evidentiary material of which no more can be said than that it could have been subjected to tests, the results of which might have exonerated the defendant. Part of the reason for the difference in treatment is found in the observation made by the Court in Trombetta, supra, [467 U.S. at page] 486, that '[w]henever potentially exculpatory evidence is permanently lost, courts face the treacherous task of divining the import of materials whose contents are unknown and, very often, disputed.' Part of it stems from our unwillingness to read the 'fundamental fairness' requirement of the Due Process Clause, [citation], as imposing on the police an undifferentiated and absolute duty to retain and to preserve all material that might be of conceivable

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[10] [footnote in text of opinion] Brady v. Maryland (1963) 373 U.S. 83 [10 L.Ed.2d 215].

evidentiary significance in a particular prosecution. We think that requiring a defendant to show bad faith on the part of the police both limits the extent of the police's obligation to preserve evidence to reasonable bounds and confines it to that class of cases where the interests of justice most clearly require it, i.e., those cases in which the police themselves by their conduct indicate that the evidence could form a basis for exonerating the defendant." (488 U.S. at pp. 57-58 [at p. 289].)

Thus, a due process violation occurs when law enforcement officials fail to preserve evidence that is exculpatory, the exculpatory value was apparent before the evidence was destroyed, and was of such a nature that the defendant would be unable to obtain comparable evidence by other means. (Trombetta, supra, 467 U.S. at p. 489 [81 L.Ed.2d at p. 422].) However, when the evidence in question is only potentially useful, the defendant must show bad faith on the part of the police. (Youngblood, supra, 488 U.S. at p. 58 [102 L.Ed.2d at p. 289]; People v. Catlin (2001) 26 Cal.4th 81, 160.)

The trial court's failure to impose sanctions was proper. The information provided by the CI was not exculpatory in nature. As defense counsel conceded at the hearing, it was nothing more than pure speculative hearsay based on rumor and innuendo. The most that can be said for the CI's identity is that it might have led to potentially exculpatory evidence. Defendant was required therefore to show that Captain Cox acted in bad faith by failing to preserve the CI's identity. However defendant characterized Cox's treatment of the information as "negligent"

and impliedly conceded at trial there was no bad faith.

Nevertheless, citing a footnote in Youngblood, supra, 488 U.S. at page 56 [102 L.Ed.2d at p. 288], defendant now claims for the first time on appeal that Captain Cox acted in bad faith. She bases this claim on the mere fact he testified that he knew of the exculpatory value of the evidence at the time it was lost or destroyed. In view of defendant's concession that Cox did not act in bad faith, she has waived her right to make a contrary claim at this late date. (People v. Michaels (2002) 28 Cal.4th 486, 511, 122 Cal. Rptr. 2d 285, 49 P.3d 1032.)[11]

Third, as the trial court found at the initial hearing, the defense had all the evidence the CI had and therefore it was not clear what more the CI could disclose even if he or she could be located. The investigative report of the CI's statement identified several possible suspects by name including the names of the men associated with the Ford Fiesta. The defense therefore had sufficient information to investigate its third-party culpability defense. The fact those leads were fruitless only underscores the conjectural nature of the information and does not alter our conclusion that the defense was able to obtain comparable information by other means.

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[11] [Cal App. footnote] While knowledge of the exculpatory value of the evidence may be a factor in finding bad faith (Youngblood, supra, 488 U.S. at p. 56 [102 L.Ed.2d at p. 288]), Youngblood does not hold that it is the only factor. After hearing testimony on the issue, the trial court found the loss of the CI's identity was not the result of bad faith. We will not disturb that finding on this record.

> Accordingly, because the information was not material and bad faith was not shown, the trial court properly denied defendant's request for sanctions.

(*Id.* at 26-30.)

Petitioner argues that by failing to impose sanctions against the prosecutor in the form of allowing the introduction of the informant's statements, or advising the jury that the prosecution failed to preserve exculpatory information relevant to third party culpability, the trial court "effectively prevented petitioner from developing the necessary additional evidence to place third party culpability before the jury." (Pet. at 25.)

Due process requires that the prosecution disclose exculpatory evidence within its possession. Brady v. Maryland, 373 U.S. 83, 87 (1963). However, a failure to preserve evidence violates a defendant's right to due process only if the unavailable evidence possessed "exculpatory value that was apparent before the evidence was destroyed, and [is] of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means." California v. Trombetta, 467 U.S. 479, 489 (1984); Cooper v. Calderon, 255 F.3d 1104, 1113 (9th Cir. 2001). A defendant must also demonstrate that the police acted in bad faith in failing to preserve potentially useful evidence. Arizona v. Youngblood, 488 U.S. 51, 58 (1988); Cooper, 255 F.3d at 1113; see also Guam v. Muna, 999 F.2d 397, 400 (9th Cir. 1993). The presence or absence of bad faith turns on the government's knowledge of the apparent exculpatory value of the evidence at the time it was lost or destroyed. Youngblood, 488 U.S. at 56-57 n.*; see also United States v. Cooper, 983 F.2d 928, 931 (9th Cir. 1993).

After a review of the record, this court concludes that the actions of the police in failing to preserve the identity of the confidential informant did not violate petitioner's right to due process. Detective Cox testified that he interviewed the confidential informant years prior to petitioner's trial in connection with his investigation into the Bateson murder. (Respondents' Lodged Doc. No. 9 at 12-14.) He had a practice of recording the name and address of confidential informants in a notebook and he believed he had done that in this case. (Id. at 14.) Cox testified that he was unable to locate his notes with the informant's identifying information but he did not know when the notes were lost or why he was unable to locate them. (Id. at 14-15, 18.) He states, "I could have purged [the notebook] a few years back. I don't know." (Id. at 15.) Cox also testified that, at the time he obtained the information from the informant, he considered it "important, in terms of [his] investigation." (Id. at 20.) When asked whether he had "done anything to intentionally destroy information that would lead to the identity of the informant," he responded, "Absolutely not." (Id. at 21.) Cox also stated that he was not the primary investigator on the case. (Id.) As explained by the state appellate court, petitioner's trial counsel "characterized Cox's treatment of the information as 'negligent' and impliedly conceded at trial there was no bad faith." (Opinion at 28-29; see also Respondents' Lodged Doc. No. 9 at 169-70.)

Under the circumstances described above, even assuming arguendo that production of the informant's identifying information may have been potentially useful to the defense, petitioner cannot demonstrate that the failure to preserve this evidence was an act of bad faith on the part of the

prosecution. Although Detective Cox testified that he considered the information given by the confidential informant to be important to his investigation at the time, he did not testify, nor does it appear, that the informant's speculation as to the identity of the killer(s) was sufficiently exculpatory. Further, as noted by the state court, "the defense had all the evidence the CI had" and therefore could have followed up on this information itself. At most, the record demonstrates that evidence that might have led to exculpatory information was inadvertently lost. This is insufficient to demonstrate a due process violation.

Petitioner has also failed to demonstrate prejudice with respect to this claim. Habeas relief is usually warranted only if the alleged constitutional errors had a "substantial and injurious effect or influence in determining the jury's verdict." Brecht v. Abrahamson, 507 U.S. 619, 637 (1993) (quoting Kotteakos v. United States, 328 U.S. at 776 (1946)). See also Fry v. Pliler, ___ U.S. ___, 127 S.Ct. 2321, 2325 (2007) ("[t]he opinion in Brecht clearly assumed that the Kotteakos standard would apply in virtually all § 2254 cases"). Petitioner acknowledges that "the confidential informant was speculating" about possible explanations for Bateson's death. (P&A at 25.) As explained by the California Court of Appeal, the informant suggested that three people might have killed Bateson by mistake, believing he was Delgado. The informant offered a number of different motives, depending on the suspect involved. Even if the jury heard all of this evidence, there is no significant possibility the result of the proceedings would have been different. The information given by the confidential informant was conclusory, and obviously based on guesswork. Under these

circumstances, the trial court's error, if any, in failing to impose sanctions on the prosecution did not have a "substantial and injurious effect or influence in determining the jury's verdict."

For all of these reasons, petitioner is not entitled to relief on this claim.

D. Failure to Admonish the Jury Following Prosecutorial Misconduct

Petitioner claims that the trial court violated her right to a fair trial when it denied her request for an admonition to the jury following prosecutorial misconduct in closing argument. The California Court of Appeal fairly described the background to this claim as follows:

> During his opening argument to the jury, the prosecutor spoke about defendant's 2001 statement to detectives in which she confessed to shooting her husband. While pointing out the circumstances of the interview, the prosecutor stated "[a]lthough it was a confrontative interview, it clearly was not a coercive interview. And you never would have heard that interview if it was a coercive interview."
>
> Shortly afterwards, the court recessed and defense counsel objected to the prosecutor's remark on the grounds it could leave the jury with the erroneous impression the court had previously determined the confession was not coerced. Counsel suggested that the court admonish the jury with a curative instruction, which would have informed the jury the court had not concluded there was no coercion and that it was for the jury to decide whether there was coercion and the weight to give it.

> The court agreed that someone could draw an inference from the prosecutor's remark that the confession had passed judicial muster but declined to admonish the jury, concluding that it would only aggravate the situation. The court suggested that the parties clarify the matter during their remaining arguments.
>
> The parties then argued their respective positions as to whether the confession was coerced and whether the jury should find defendant's confession was true. Neither party however addressed the issue whether the court had made a prior finding on the question of coercion or that it was the jury's role to make that determination.

(Opinion at 20.)

The state appellate court concluded that any error in declining to give a jury admonition was harmless, reasoning as follows:

> Although the prosecutor has broad discretion to discuss the legal and factual merits of a case, it is improper to mislead the jury by misstating the law. (People v. Bell (1989) 49 Cal.3d 502, 538.) Because an involuntary confession is inadmissible, when the voluntariness of a confession is in dispute, it is for the trial court to make that legal determination in the first instance outside the presence of the jury. (Jackson v. Denno (1964) 378 U.S. 368, 386 [12 L.Ed.2d 908, 921].) Evidence Code section 405 sets forth the procedure for making that determination. (People v. Carroll (1970) 4 Cal.App.3d 52, 59-60.)
>
> However, while the jury cannot redetermine the admissibility of a confession (See Evid.Code, § 405, subd. (b)(2)), the defendant has the right to produce evidence of coercion at trial

bearing upon the truth or falsity of her confession and the weight to be given it. (Jackson v. Denno, supra, 378 U.S. at p. 386, fn. 13 [12 L.Ed.2d at p. 921]; People v. Memro (1985) 38 Cal.3d 658, 684, fn. 28; People v. Carroll, supra, 4 Cal.App.3d at p. 60.)

As the trial court found, the prosecutor's statement may have misled the jury about its role in determining the issue of coercion by implying the issue had already been determined by the court. Nevertheless, because the trial court properly instructed the jury on its role during the instructional phase of the trial, neither the prosecutor's remark nor the court's failure to admonish the jury at the time the remark was made resulted in a miscarriage of justice. (People v. Watson (1956) 46 Cal.2d 818, 835.)

Defendant contends the prosecutor's remark was prejudicial because it was made during closing argument and the primary factual issue in the case was the reliability and credibility of her confession. While we do not disagree with defendant's claim the confession was the centerpiece of the prosecution's case, we disagree with her conclusion the prosecutor's remark was prejudicial.

The remark was a single isolated comment that was ambiguous and may have been misleading to some jurors at the time it was made. However, any confusion was dispelled by the court's instructions to the jury. As part of its instructional charge, the trial court told the jury it was to determine what facts were proved from the evidence at trial and not from any other source, that statements made by the attorneys during the trial were not evidence, and that the jury had to accept and follow the law as the court stated it,

> even if its statement conflicted with the attorneys' statements. The court also defined the terms "confession" and "admission" and then immediately informed the jury, "You are the exclusive judges as to whether the defendant made a confession or an admission, and if so, whether that statement is true in whole or in part." We must assume the jury understood and faithfully followed the court's instructions. (People v. Chavez (2000) 84 Cal.App.4th 25, 30-31.)
>
> These instructions adequately clarified the jury's role in determining the issue of coercion. Because defendant claimed the detectives coerced her into falsely confessing and both parties fully argued that question, the instructions given were adequate to inform the jury of its fact-finding role. The trial court was under no duty to give an admonition at the time the challenged remark was made when the jury had been properly instructed on its fact-finding role during the instructional phase of the trial. Accordingly, we find defendant was not prejudiced by the court's failure to admonish the jury as requested.

(Id. at 21-23.)

Petitioner's claim, in essence, is that the trial court violated her right to due process and a fair trial when it failed to correct the possible false impression given by the prosecutor during his closing argument. As explained above, the California Court of Appeal concluded that any error in this regard was harmless. In order to grant habeas relief where a state court has determined that a constitutional error was harmless, a reviewing court must determine: (1) that the state court's decision was "contrary to" or an "unreasonable application" of federal law with

respect to harmless error, and (2) that the petitioner suffered prejudice under Brecht as a result of the constitutional error. Inthavong v. LaMarque, 420 F.3d 1055, 1059 (9th Cir. 2005). See also Mitchell v. Esparza, 540 U.S. 12, 17-18 (2003) (when a state court determines that a constitutional error is harmless, a federal court may not award habeas relief under § 2254 unless that harmlessness determination itself was unreasonable). Both of these tests must be satisfied before relief can be granted. Inthavong, 420 F.3d at 1061.

Assuming arguendo that the state trial court erred in failing to issue a jury admonition following the prosecutor's closing argument, petitioner has failed to demonstrate that the error sufficiently prejudiced her. For the reasons expressed by the state appellate court, any possible confusion inherent in the prosecutor's argument would have been cleared up by the jury instructions as a whole, including the instruction that the jurors were the "exclusive judges" as to whether petitioner made a truthful confession. Just as importantly to the undersigned is the fact that the jury would have understood the continuing arguments on confession coercion as a clear indication that the issue was one for them to find. What would have been the point of arguing the issue, a juror would reason, if the matter had already been conclusively determined. The undersigned is also persuaded, as set out in the next section, that much indicia existed to suggest that the confession was not coerced. Petitioner was in a familiar setting and no reasonable person would have believed that she was "in custody," the tone of the interrogation was not overbearing, she was told she could talk to "someone else" if she so desired. It is difficult to say that the Court of Appeal was

unreasonable when it found the potentially misleading comment harmless despite the fact that it did tread on petitioner's primary defense to the confession.[12] There is no reasonable possibility that the trial court's failure to issue an admonition had a substantial and injurious effect on the verdict in this case. The state court's decision to the same effect is not contrary to or an unreasonable application of federal law with respect to harmless error and should not be set aside.

E. Involuntary Confession

Petitioner claims that her right to due process was violated by the admission into evidence of her involuntary confession. (Pet. at 28-29.) The California Court of Appeal fairly described the background to this claim as follows:

> In defendant's motion to exclude her confession, she argued that it was involuntary because the detectives conducted it with threats and implied promises of leniency and psychological coercion concerning her children. The trial court read the transcript, listened to portions of the tape identified by counsel, and heard testimony from the two detectives who conducted the interview, as well as defendant. The following testimony was given:
>
> Detective Grashoff testified that he suspected defendant of killing Bateson and went to her house to get a confession.

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[12] Although the point has not been raised by the parties, the prosecutor's comment could be interpreted as vouching, i.e., that neither her nor his office would ever insert a coerced confession into the case. For the same reasons as stated above, the court would find such vouching harmless.

Defendant was expecting Detective Grashoff when he and Detective Blankenship arrived at her home. The detectives were wearing civilian clothing and were both carrying weapons. The interview was conducted around defendant's kitchen table. The detectives falsely told defendant a prosecutor had been assigned to the case and that they were close to solving it, and showed her a document of a "Secret Witness" tip, which they had created themselves. They also showed her the cover sheet of an FBI "profile" on the case.

Defendant testified that she was 32 years old at the time of the interview, she was a high school graduate, and had attended half of a semester at Shasta College. At the time she made her statement, her children were everything to her. All she ever wanted was to be married with a family. She took care of her three children and Jim, a developmentally disabled man with the mental capacity of a four-year old, who was present in the house during the interview. The detectives spoke with her about matters unrelated to their investigation for about five to 10 minutes before turning on the tape recorder. They then questioned her about her recollection of the day before and the day of the killing. She did not feel she was under suspicion at that time.

Defendant tried to cooperate but she felt the detectives were not hearing her. She became stressed during the interview because Jim kept interrupting and it was becoming apparent that the detectives did not believe what she was telling them. When they became accusatory, she became nervous, scared, and intimidated because she did not know what they could do. She

> knew she had rights but did not know what they were. When the detectives began mentioning her children and imploring her to tell the truth so they could tell the district attorney she had cooperated, she became concerned the detectives could take her children away from her. She thought if she told them what they wanted to hear by falsely confessing, she would be allowed to remain with her children and the detectives would leave her and her children alone.
>
> At the conclusion of the hearing and after listening to the interview, the court found the interview was calm throughout and there was nothing overbearing, threatening, or intimidating about the officers' conduct. The court concluded the prosecution had proven that defendant's confession was voluntary beyond a reasonable doubt and that under the totality of the circumstances, the confession was not coerced, but was an exercise of free will. It therefore denied the motion to exclude the confession.

(Opinion at 30-32.)

Petitioner claims that the following circumstances compel a conclusion that her confession was involuntary: (1) Officer Grashoff went to petitioner's residence to secure a confession; (2) Grashoff spent an hour "softening petitioner up" and then "went on the offensive," accusing petitioner of inconsistency; (3) Grashoff referred to an FBI profile which allegedly indicated that petitioner was guilty, and repeatedly told petitioner the officers knew she was guilty; (4) Grashoff inferred petitioner would get more lenient treatment and would be able to keep her children if she confessed; (5) Grashoff implied that petitioner would lose her children if she did not

confess; (6) Grashoff discouraged petitioner from talking to anyone before she confessed and told her that her repeated requests to speak to someone demonstrated her guilt; and (7) the interrogating detectives repeatedly implied that petitioner would get beneficial treatment if she "told them what they wanted to hear." (Pet. at 28.) Petitioner contends that she "adopted the officer's suggestion that the reason she killed her husband was that he was controlling." (Id.) She notes that she could not provide information regarding what she had done with the weapon, which indicates that her confession was false. (Id.)

The California Court of Appeal concluded that petitioner's confession was voluntary, reasoning as follows:

> When the defendant challenges her confession as involuntary, it is inadmissible at trial unless the prosecution establishes by a preponderance of the evidence that it was voluntary. (People v. Williams (1997) 16 Cal.4th 635, 659-660.) "A confession or admission is involuntary, and thus subject to exclusion at trial, only if it is the product of coercive police activity." (Id. at p. 659.) The appellate court reviews the trial court's determination on the issue of voluntariness de novo, while reviewing the trial court's historical findings of fact surrounding the confession under the deferential substantial evidence standard. (Id. at pp. 659-660.)
>
> "In deciding the question of voluntariness, the United States Supreme Court has directed courts to consider 'the totality of circumstances.' [Citations.] Relevant are 'the crucial element of police coercion [citation]; the length of the interrogation [citation]; its location [citation]; its

continuity' as well as 'the defendant's maturity [citation]; education [citation]; physical condition [citation]; and mental health.'" (People v. Williams, supra, 16 Cal.4th at p. 660, quoting Withrow v. Williams (1993) 507 U.S. 680, 693-694 [123 L.Ed.2d 407, 420].)

A confession is voluntary if the suspect's decision to speak is entirely "self-motivated" because she freely and voluntarily chooses to speak without any form of compulsion or promise of reward. (People v. Thompson (1980) 27 Cal.3d 303, 327-328.) No single factor is dispositive in determining the question of voluntariness. (People v. Williams, supra, 16 Cal.4th at p. 660.)

As defendant acknowledges, lies told by the police to a suspect under questioning do not render the confession involuntary per se. The court must look to see whether the deception is reasonably likely to procure an untrue confession. (People v. Farnam (2002) 28 Cal.4th 107, 182.) Similarly, police trickery, by itself, does not render a confession involuntary (People v. Thompson (1990) 50 Cal.3d 134, 167), because subterfuge is not necessarily coercive. (People v. Felix (1977) 72 Cal.App.3d 879, 885-886.) Thus, if the defendant is led to believe she might reasonably expect benefits in the nature of more lenient treatment at the hands of the police, the prosecution, or the court, in consideration of making the statement, even if truthful, such motivation is deemed to render the statement involuntary. (People v. Holloway (2004) 33 Cal.4th 96, 115.) However, mere advice or exhortation that it would be better to tell the truth, when unaccompanied by either a threat or a promise, does not render a subsequent

confession involuntary when the benefit pointed out is merely that which flows naturally from a truthful statement. (Ibid.)

Here the relevant considerations support the trial court's finding that the confession was voluntary. At the time of the interview, defendant was 32 years old, had graduated from high school and had attended college for a short time. She consented to the interview, which took place in her home around the kitchen table. The detectives were in plain clothes and defendant was not under arrest. She was free to move about her home and to speak to someone. Defendant had been living for nine years with the horrible secret that she killed her husband. During the interview, detective Grashoff reviewed the events leading up to and following the killing, pointed out the inconsistencies in defendant's story, informed her that her denials were no longer credible, and that the matter would not go away if she continued to deny that she killed her husband. He did not badger her. The detectives' promises that they would not arrest her that day, they would immediately leave upon her request, and that she could halt the interview at any time, further served to eliminate a coercive atmosphere. Any implied benefits arising from their statement that they would inform the prosecutor of her cooperation if she gave a truthful statement, was merely that which would flow naturally from such a statement.

The interview lasted approximately two hours. After telling the detectives that she shot Bateson, and explaining why she did it, defendant admitted that she felt a little better having told the truth and that it was off her heart. She explained that when

she shot Bateson, she was not thinking right, that she was 22 years old when she shot him, she had grown a lot in the last nine years and would never do something like that now. When the detective asked her how often she thought about it during the past nine years, she stated, "[a]ll the time." When he asked her if she was being honest with him she replied, "Yes, I am being honest. If I wasn't gonna be honest with you I could have sat here and said 'no.'" At the end of the interview, the detective asked defendant how many times she shot Bateson. She said she "snapped" and did not know what she did. When the detective repeated, "How many times?" she stated "I don't remember. I'm not gonna say a number if I don't know. So." These are not the responses of a person who has been coerced into falsely confessing. To the contrary, they demonstrate that she was acting under her own free will and in her own interests.

Nevertheless, defendant argues that when the detective told her she should not let "this thing bite you in the butt on down the road with your kids" he created an inference that defendant would get more lenient treatment if she confessed and would not lose her kids. We disagree. The detective stated, "You don't want this thing, . . . down the road, it's gonna come up sooner or later. And they're gonna take you away from your kids. I'm giving you the opportunity now to tell the truth." We fail to see any promise of leniency in this statement. The detective was merely suggesting that if defendant did not presently own up to her crime, it would eventually catch up to her and her children and she would lose them sooner or later.

> The detective's statement, "if you're guilty, I mean that's the best thing to do is get an attorney," does not imply that defendant is guilty. When defendant indicated that she wanted to talk to someone first, the detective stated "You don't want to tell the truth then that's fine. You want to talk to somebody first that's fine. Maybe we can set up an appointment later to talk about it. But, I'm just offering you the opportunity now for you to tell the truth. I mean you're the one that has to deal with it. I really feel sorry for your kids." Defendant then stated that she did not "remember, things." After asking her what she did not remember, he said, "Okay, I'll ask you. Straight up. Did you shoot Charlie?" whereupon defendant said, "Yes." Again, there is nothing in this line of inquiry that threatened defendant with the loss of her children if she did not immediately confess. The detective was merely suggesting that it is difficult to live with a lie and that he feels sorry for the children because they are also affected.
>
> We therefore conclude under the totality of circumstances, the confession was voluntary. Accordingly, the trial court properly denied defendant's request to suppress the confession.

(Opinion at 32-37.)

As set forth above, the California Court of Appeal referred back to and incorporated the reasoning of the trial court in its own decision on petitioner's claim. Accordingly, this court will apply the AEDPA standards to the conclusion of the trial court as well as the appellate court when analyzing petitioner's claim that her confession was involuntary. See Edwards v. Lamarque, 475 F.3d 1121, 1126 (9th Cir. 2007). The trial court explained

its ruling denying petitioner's motion to suppress her confession as follows:

> The motion is denied. I think the test is beyond a reasonable doubt, although in this case I don't even entertain a reasonable doubt. The people have proven to my satisfaction beyond a reasonable doubt that this statement is voluntary. It's not the product of coercion. I think I have already recited what I have considered. Another thing that may not be fully on the record unless one actually listens to the tape is the tones of voice or the tones of voice on the tape. It was a calm conversation throughout. The officers were using calm tones.
>
> I have heard what Ms. Lunbery said about body language, but in terms of the tones of voice, volume, things of that nature that one can discern from an audio tape, there was nothing overbearing, coercive, threatening, or intimidating about the officer's conduct.
>
> In terms of this, quote, believing she knew what the officers wanted her to say or what the truth is, close quote, in virtually every case where somebody has once been interviewed and denied culpability and that person is again interviewed and is told that that person is a suspect and the officers want the truth, that same argument could be made. Well, it's implicit that they didn't like what they heard before, but the officers made it clear why they didn't believe the prior comments, and that's what that whole analogy with the Popsicles was about; that there's circumstantial evidence and other evidence that points to her, and so that was pointed out to the defendant. There's nothing improper about that.

So one of the tests that I am supposed to look at is was there an exercise of freewill, and the transcript and the tape are replete with evidence that Ms. Lunbery knew what was going on; that she was exercising her freewill. She twice commented upon the possibility that she would talk to someone else. In response she was told that she could. No threatening consequence was presented if she did that, and just seconds before she ultimately admitted responsibility for shooting her husband, she is told by one of the detectives that if she wants to talk to someone else, she can do that and that they could maybe reschedule the interview for a later time. That is not suggestive of overbearance. That is not suggestive of coercion. That's not suggestive of intimidation or threats.

When I look at the totality of the circumstances, I am mindful that she was not advised of her Miranda. I think we all recognize that she was not in custody. That was made abundantly clear to her on the tape, but this is one of the factors I should consider, and I do. It's clear that the defendant was aware she could talk to someone else and the officers confirmed that and did not suggest otherwise and did not suggest that if she chose to do that she would be arrested or that she would get any other consequence other than those she in my view unreasonably -- if she took these inferences, she took them unreasonably, not due to any misconduct, that there was going to be some implied promise or detriment if she didn't go the way she thought the officers wanted her to. And there are numerous other places where Ms. Lunbery's questions and statements indicate exercise of freewill and indicates she was not intimidated.

> As a matter of fact, she very close to the time she ultimately confessed was obviously trying to cause the detectives to tell her what they knew. She wanted to know what the Popsicle on her face was. She wanted to know what she was up against before she made a decision. That's just further evidence that she was in a decision-making process, and it was one of her own freewill.
>
> So my view is the statement is voluntary. It's an exercise of her own freewill, not the product of coercion or overbearing tactics, not the product of promised benefits, threats, or promised avoided consequences or leniency.
>
> So the motion is denied, and the tape will be admissible.

(Respondents' Lodged Doc. No. 9 at 134-36.)

The Constitution demands that confessions be made voluntarily. See Lego v. Twomey, 404 U.S. 477, 483-85 (1972). Involuntary confessions may not be used to convict criminal defendants because they are inherently untrustworthy and because society shares "the deep-rooted feeling that the police must obey the law while enforcing the law; that in the end life and liberty can be as much endangered from illegal methods used to convict those thought to be criminals as from the actual criminals themselves." Spano v. New York, 360 U.S. 315, 320-21 (1959). A confession is voluntary only if it is "'the product of a rational intellect and a free will.'" Medeiros v. Shimoda, 889 F.2d 819, 823 (9th Cir. 1989) (quoting Townsend v. Sain, 372 U.S. 293, 307 (1963)). See also Blackburn v. Alabama, 361 U.S. 199, 208 (1960). "The line of distinction is that at which governing self-direction is lost and compulsion, of whatever nature or however infused, propels or helps to propel the confession."

Collazo v. Estelle, 940 F.2d 411, 416 (9th Cir. 1991) (en banc) (quoting Culombe v. Connecticut, 367 U.S. 568, 602 (1961)).

"There is no 'talismanic definition of voluntariness' that is 'mechanically applicable.'" Clark v. Murphy, 331 F.3d 1062, 1072 (9th Cir. 2003) (quoting Schneckloth v. Bustamonte, 412 U.S. 218, 224 (1973)). Rather, voluntariness is to be determined in light of the totality of the circumstances. See Miller v. Fenton, 474 U.S. 104, 112 (1985); Haynes v. Washington, 373 U.S. 503, 513 (1963); Beaty v. Stewart, 303 F.3d 975, 992 (9th Cir. 2002). This includes consideration of both the characteristics of the petitioner and the details of the interrogation. Schneckloth, 412 U.S. at 226. Relevant circumstances that should be considered include the following factors: (1) the youth of the accused; (2) his/her intelligence; (3) the lack of any advice to the accused of his/her constitutional rights; (4) the length of the detention; (5) the prolonged nature of the questioning; and (6) the use of any punishment such as the deprivation of food or sleep. Id. at 226; United States v. Haswood, 350 F.3d 1024, 1027 (9th Cir. 2003).

Officials cannot extract a confession "by any sort of threats or violence, nor . . . by any direct or implied promises, however slight, nor by the exertion of any improper influence." Hutto v. Ross, 429 U.S. 28, 30 (1976) (quoting Bram v. United States, 168 U.S. 532, 542-43 (1897)).[13] Neither physical

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[13] This broadly-stated rule has not been applied to invalidate, per se, all statements made by a suspect in response to a promise made by law enforcement personnel. Rather, the promise must be sufficiently compelling to overbear the suspect's will in light of all attendant circumstances. *See Hutto*, 429 U.S. at 30.

intimidation nor psychological pressure is permissible. Haswood, 350 F.3d at 1027 ("A confession is involuntary if coerced either by physical intimidation or psychological pressure."); United States v. Tingle, 658 F.2d 1332, 1335 (9th Cir. 1981) ("subtle psychological coercion suffices . . . at times more effectively 'to overbear a rational intellect and a free will'").

False promises or threats may also render a confession invalid. *See, e.g., Lynumn v. Illinois*, 372 U.S. 528, 534 (1963) (confession found to be coerced by officers' false statements that state financial aid for defendant's infant children would be cut off, and her children taken from her, if she did not cooperate); Rogers v. Richmond, 365 U.S. 534, 541-45 (1961) (defendant's confession was coerced when it was obtained in response to a police threat to take defendant's wife into custody); Spano, 360 U.S. at 323 (confession found to be coerced where police instructed a friend of the accused to falsely state that petitioner's telephone call had gotten him into trouble, that his job was in jeopardy and that loss of his job would be disastrous to his three children, his wife and his unborn child); Miranda v. Arizona, 384 U.S. 436, 476 (1966) ("any evidence that the accused was threatened, tricked, or cajoled into a waiver (of Fifth Amendment right to remain silent) will, of course, show that the defendant did not voluntarily waive his privilege"). But cf. Pollard v. Galaza, 290 F.3d 1030, 1034 (9th Cir. 2002) ("misrepresentations made by law enforcement in obtaining a statement, while reprehensible, does not necessarily constitute coercive conduct").

Where an involuntary confession is improperly admitted at trial, a reviewing court must apply a harmless error analysis, assessing the error "in the

context of other evidence presented in order to determine whether its admission was harmless beyond a reasonable doubt." Arizona v. Fulminante, 499 U.S. 279, 308 (1991). In the context of habeas review, the standard is whether the error had substantial and injurious effect or influence in determining the jury's verdict. See Brecht, 507 U.S. at 637; Beaty, 303 F.3d at 994. The analysis must be conducted with an awareness that "a confession is like no other evidence," and that "a full confession may have a 'profound impact' on the jury." Fulminante, 499 U.S. at 296. See also Taylor v. Maddox, 366 F.3d 992, 1017 (9th Cir. 2004).

This court has reviewed the written transcript of petitioner's confession. See CT 458A-541; (also CT 114-196). After numerous pages of general conversation, Detective Grashoff informed petitioner that things were "pointing in [her] direction." (Respondents' Lodged Doc. No. 10 (CT) at 521.) He informed petitioner that he suspected her of shooting her husband and stated that "if this is the case that Charlie was being abusive to ya and something where you just snapped, and it happened, let me know now, so I can go to the DA and tell him, that, number one you're being honest with me." (Id. at 522.) Grashoff stated that "the best thing you can do right now for yourself, is so I can go back to the District Attorneys office and say, Mr. District Attorney, yes there is one assigned to the case already . . . she was honest with me and told me the truth. That's what you've got going for you right now." (Id. at 524.) Grashoff told petitioner that the train was "leaving the station" and that she didn't "want to miss it." (Id.) He also stated:

> You have to deal with it. This has been going on a long time, and its gut wrenching

> at you, this has been nine years now, and I know you had to been thinking about it. And if it's a case where, you know, if Charlie was abusing you, and I've talked to witnesses and they told me, well they thought Charlie was abusing you, that's at one time. If that's the case, tell me. Don't let this thing bite you in the butt down the road. Now tell me the truth what happened.

(*Id.* at 524.)

After Detective Grashoff informed petitioner once again that they "know you did it," she stated, "I personally think that I know enough about the law that, that I mean I have um, rights to be able to talk to someone." (Id. at 525.) Grashoff responded, "Sure. You, you, you do." (Id.) He further stated "if you're guilty, I mean that's the best thing to do is get an attorney" . . . "that is totally up to you . . . That is your decision," and "that is certainly your right, to talk to an attorney." (Id.) Grashoff further informed petitioner that "you can tell me to leave at any time." (Id.)

Petitioner then asked Detective Grashoff what evidence they had against her. (Id.) Grashoff declined to describe the evidence. (Id.) He told petitioner that he was giving her the opportunity to tell the truth, that the "train [was] leaving the station," that the ball was in her court, and that he was not going to arrest her at that time. (Id. at 526.) After several other statements, Grashoff stated, "You don't want this thing keep, down the road, it's gonna come up sooner or later. And they're gonna take you away from your kids. I'm giving you the opportunity now to tell the truth." (Id. at 527.) He told petitioner that he was offering her the opportunity to tell the truth, that she was the one who had to "deal with it," and

that he felt sorry for her kids. (Id. at 529.) Petitioner stated that there were things she didn't remember. (Id.) Grashoff responded, "Okay, I'll ask you. Straight up. Did you shoot Charlie?" (Id.) Petitioner then stated, "yes," and continued with her confession. (Id.)

After stating that she shot her husband, petitioner explained that he was "controlling," that he had "grabbed" her several times, that she didn't like the way he talked to her, and that "no one could say 'hi' to me without it causing an argument." (Id. at 530, 535-36.) Petitioner explained that she "didn't do it to hurt anyone," and that "even though I know . . . I did it, . . . I just wasn't thinking right." (Id. at 532.) She couldn't remember what she did with the gun, but she remembered "driving around a lot." (Id.) Petitioner also answered specific questions about her commission of the crime. (Id. at 533-35.) She explained that she had changed since the shooting had occurred, that she would never do something like that now, and that she "obviously was not thinking straight." (Id. at 537.) Petitioner stated she thought about it "all the time," that she "wished [she] could have done things different," and that she wished every day that she could "take it back." (Id. at 540-41.)

The California Court of Appeal concluded that the totality of the circumstances demonstrated that petitioner's confession was voluntary. This court agrees. As noted by the state appellate court, at the time of the interrogation petitioner was an educated 32 year old, she had consented to the interview, the interview took place in her own home, and she was told several times that she would not be arrested that day and that she could tell the detectives to leave. The trial court found, after listening to the audiotape, that the interview was "calm" and that there was

nothing "overbearing, coercive, threatening, or intimidating" about the officer's conduct on the tape. Although the audiotape of petitioner's interrogation has not been lodged with this court, the trial court's factual findings in this regard are entitled to a presumption of correctness under AEDPA and they have not been rebutted by petitioner. Rupe v. Wood, 93 F.3d 1434, 1444 (9th Cir. 1996). See also 28 U.S.C. §2254(d)(2). The state appellate court also noted that petitioner refused to answer questions regarding events she could not remember, stated that she was being honest, described her current feelings about the crime she committed, and admitted she thought about the shooting all the time. This court agrees with the state court that these "are not the responses of a person who has been coerced into falsely confessing." (Opinion at 35.)

The California Court of Appeal concluded that Detective Grashoff's false statements to petitioner, standing alone, did not render the circumstances coercive. (Id. at 33.) This conclusion is consistent with United States Supreme Court precedent, which has refused to find that a defendant who confesses after being falsely told that his codefendant has turned State's evidence has done so involuntarily, where the totality of the circumstances indicates the confession was voluntarily made. Frazier v. Cupp, 394 U.S. 731, 739 (1969). The state appellate court also concluded that Detective Grashoff did not make in implied promise of leniency when he told petitioner he would advise the prosecutor of her truthfulness if she would admit her role in the crime. The court found that this was simply a result "which would flow naturally from such a statement." (Opinion at 35.) This court agrees with the California Court of Appeal that these statements were not

coercive. It is true that a promise of leniency accompanied by threats or other coercive practices constitutes improper influence and may make a subsequent inculpatory statement involuntary. See Tingle, 658 F.2d at 1336. However, Detective Grashoff did not promise anything to petitioner or even hint that petitioner would receive favorable treatment in her criminal case if she confessed.

Nor were Detective Grashoff's statements accompanied by threats or other coercive practices that would render a subsequent confession involuntary. "[C]oercive police activity is a necessary predicate to the finding that a confession is not 'voluntary' within the meaning of the Due Process Clause...." Colorado v. Connelly, 479 U.S. 157, 167 (1986). See also United States v. Harrison, 34 F.3d 886, 891 (9th Cir. 1994) ("[I]n most circumstances, speculation that cooperation will benefit the defendant or even promises to recommend leniency are not sufficiently compelling to overbear a defendant's will"); United States v. Leon Guerrero, 847 F.2d 1363, 1366 (9th Cir. 1988) (citations omitted) (an interrogating agent's promise to inform the government prosecutor about a suspect's cooperation, even if accompanied by a promise to recommend leniency or by speculation that cooperation would have a positive effect, would not render a subsequent statement involuntary in the absence of threats or other coercive practices).

Further, even if Detective Grashoff implied that petitioner would fare better if she confessed to her role in the events, the California Court of Appeal did not clearly err in finding that petitioner's refusal to fully cooperate with Detective Grashoff during the latter portion of the interrogation demonstrates that her will was not overborne. The fact that petitioner

refused to answer questions if she did not remember the events suggests that she felt comfortable exercising her free will and that there was no causal link between the purported promise of leniency and her later confession. In short, the evidence indicates that Detective Grashoff did not make any specific promises of leniency, let alone promises significant enough to overbear petitioner's will.

This court also agrees with the state appellate court that Detective Grashoff's comments about petitioner's children did not rise to the level of a promise of lenient treatment if she confessed or a threat to take away her children if she didn't confess. Cf. Tingle, 658 F.2d at 1336 (interrogation deemed coercive where the interrogating agent informed defendant of the maximum penalties for the crimes of which she was suspected, totaling 40 years imprisonment; stated that defendant would not see her two-year-old child "for a while;" warned defendant that she had "a lot at stake;" told defendant that it would be in her best interest to cooperate and that her cooperation would be communicated to the prosecutor; and told defendant that if she failed to cooperate he would inform the prosecutor that she was "stubborn or hard-headed"). The state court's conclusion that Detective Grashoff was merely "suggesting that if defendant did not presently own up to her crime, it would eventually catch up to her and her children and she would lose them sooner or later" is not an unreasonable determination of the facts of this case. See 28 U.S.C. § 2254(d)(2).[14]

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[14] The statement about taking away the kids is the most problematic. But it was not stated that they would be taken away, now. Actually, the statement as said might have deterred a confession at that point — if the kids were inevitably going to

This court notes that petitioner was not advised of her constitutional (Miranda) rights during the interrogation at her home. The trial court opined that petitioner was not in custody, and therefore not entitled to Miranda warnings, because the totality of the circumstances indicated petitioner was free to terminate the interview. This conclusion is consistent with the record before this court. Cf. United States v. Craighead, ___ F.3d ___, 2008 WL 3863709 at *6 (9th Cir. (Ariz.)) (defendant was in custody during in-home interrogation for Miranda purposes where circumstances made clear he was not free to terminate the interview or leave his house). Accordingly, the lack of Miranda warnings in this case does not support a finding that petitioner's confession was involuntary.

The California courts concluded that the totality of the circumstances indicated petitioner's confession was voluntary and that Detective Grashoff's methods of interrogation, including his remarks about petitioner's children and his promise to tell the prosecutor if she was truthful, did not cause petitioner's will to be overborne. This court agrees. A review of the relevant record reflects that the questioning in this case was not so heavy-handed that it would have caused petitioner to lose "self-direction." The decision of the California Court of Appeal denying petitioner's claims in this regard is not contrary to or an unreasonable application of federal authority, nor is it based on an unreasonable determination of the facts. Accordingly, petitioner is not entitled to habeas relief.

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be taken away later, if she did not confess now, a person might just wait until later to confess, and avoid the hard realties now.

Accordingly, IT IS HEREBY ORDERED that petitioner's application for a writ of habeas corpus is denied, and judgment is entered in favor of respondent.

Dated: 11/07/08

/s/ Gregory G. Hollows

UNITED STATES MAGISTRATE JUDGE

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KRISTI LYN LUNBERY, *Petitioner-Appellant*, v. TINA HORNBEAK, Warden ATTORNEY GENERAL, *Respondents-Appellees.*	No. 06-15614 D.C. No. 2:07-cv-01279-GGH OPINION

Appeal from the United States District Court
for the Eastern District of California
Gregory G. Hollows, Magistrate Judge, Presiding

Argued and Submitted
January 15, 2010—San Francisco, California

Filed May 25, 2010

Before: John T. Noonan, Michael Daly Hawkins, and Milan D. Smith, Jr., Circuit Judges.

Opinion by Judge Noonan;
Concurrence by Judge Hawkins

COUNSEL

Juliana Drous, San Francisco, California, for the petitioner-appellant.

Barton Bowers, Deputy Attorney General, Sacramento, California, for the respondents-appellees.

OPINION

NOONAN, Circuit Judge:

Kristi Lyn Lunbery appeals the denial by the district court of her petition for a writ of habeas corpus. We reverse the judgment of the district court and remand with directions to issue the writ.

FACTS

The Crime. At approximately noon on Friday, April 17, 1992, Charlie Bateson (Charlie) was discovered dead. He had been shot in the head with a single bullet discharged four to six inches from his head. His death by violence had been caused by another person. The time of his death is not established by the record on appeal.

The Investigation. A neighbor, Belinda Strickland, discovered the body in a bed in Charlie's home in Burney, Shasta County, California. The Shasta County Sheriff was notified. Detectives from his office examined the house. Blood had splattered on the floor and wall of the bedroom and on the outside of the door frame leading to a hall. No weapon was found. No bloodstained clothes were found. No signs were found of any clothes or area having been recently washed. Fingerprints, when they were taken, were of the present and recent tenants, plus some unidentified prints and an unidentified palm print. A medical examiner

performed a field investigation at the house and four days later conducted an autopsy. The house was unlocked. It was the last house on a cul-de-sac, and the detectives found footprints and tire tracks in the wooded area at the end of the street. The detectives also found a note to Charlie on the refrigerator from his wife, telling him that she was taking their two daughters to go shopping in Redding and would be back by 1 p.m. or so.

Sheriff's officers found Charlie's wife, Kristi, at the Mt. Shasta Mall in Redding with her two children and her grand-father. She was visibly upset by the terrible news the detectives brought her. She immediately consented to a search of her car, parked nearby. The detectives found no bloodstains and no weapon. Kristi herself had no apparent bloodstains on her clothes.

The detectives escorted Kristi to the Sheriff's office where she gave an account of her day. Charlie worked on the swing shift, 5 p.m. to 3 a.m., at Sierra Pacific Mills. The couple had two children, Kayla, aged 3½, and Kelsey, aged about four months. The children went to bed in the single bedroom in the small house. Kristi greeted Charlie when he returned from work, and they talked to about 3:30 a.m. Then, as ususal, they went to sleep together on a hide-away bed in the living room.

As usual, the children woke around 6:30 a.m. Charlie moved from the living room to the bed they had occupied. Kristi got up, dressed the children and got breakfast for them. She had told Charlie about the plan to go to Redding and left the note to remind him. She and the children left the home about 7:40 a.m. She left the house unlocked, as she usually did when Charlie was home.

Kristi drove to her parents' home in Burney. Her parents were out of town, but she talked to her grandfather, who was visiting there. He told her that he was planning to go to Redding, too. She then drove to the Mt. Shasta Mall, about an hour's distance.

She and the children window-shopped at the mall. At about 11 a.m., when she went to move her car, she discovered it had a flat tire. Neither she nor her grandfather could change it. She decided to call Charlie and ask for him to come with his truck. She called two times but got no answer. It was her habit to turn off the ringer while Charlie slept. She then called Belinda and asked her to go to the house to wake him.

Forensic tests established that the fatal bullet could have been discharged by twenty-seven different weapons. Fourteen such weapons were found in the course of the investigation, and two could not be ruled out as the murder weapon. They carried no identifying marks. Charlie himself had a rifle given to him by his wife's grandmother, and the model was the most common of the twenty-seven possible murder weapons. The gun had last been seen just over a week earlier in Charlie's truck. This gun was not found.

Charlie and Kristi had lived in the small house (a bedroom, a living room, a kitchen, a hall and a bathroom) for two weeks. It was located at 20292 Fir Street, Burney. It belonged to Kristi's grandmother, Margaret Beaman, who let Kristi and Charlie have it rent-free, so they could save money for a house of their own.

According to Margaret Beaman, her house had been previously occupied by Cindy Ellis and Ellis's ex-husband Frank Delgado, a known drug dealer. After Ellis and Delgado moved in, Beaman noticed an

increase in traffic to and from the house at all hours of the day and night in a relatively rural area—traffic consistent with drug sales—and she evicted them because of that activity.

The Sheriff's investigators interviewed an acquaintance of Delgado, Oney Rhoades, who had stayed with Delgado at the Fir Street house in late February 1992. Rhoades reported that he had seen Delgado and Henry Garza in that house in possession of "dope" worth $40,000.

A confidential informant told Sheriff's detective Willie Cox on April 20, 1992, three days after the murder, that he felt the killing had been a mistake. The intended victim had been Delgado because he had "ripped off several people in town over drug dealings."

A neighbor on Fir Street, John Voet, had been up in the early morning of April 17, taking his mother to the hospital. When he returned to Fir Street around 3 a.m., he had observed a '78 or '79 Ford Fiesta with a distinctive orange stripe enter the cul-de-sac. Voet watched the car turn around at the end of the street, park in front of the Bateson house, switch off its lights and engine, and after twenty to thirty seconds depart at a high rate of speed. This deliberate maneuver reminded Voet that he had seen the same car a week earlier enter the cul-de-sac and drive in and out around midnight. Voet also saw the car a second time on the day of the murder, parked in the parking lot of a pizza parlor, Half Time Pizza. A confidential informant linked the car to both Garza and Delgado.

On May 6, 1992, Rory Keim informed Sheriff's deputy Compomizzo that on Sunday night following the murder, he and two friends were in Half Time Pizza discussing Charlie's death. Henry Garza

approached their table and said: "That's a bummer. My partners blew away the wrong dude."

As of May 6, 1992, the police had four independent sources connecting the murder to drugs. A motive for the murder had been provided. A connection between the intended victim and Garza had been established. Garza had admitted knowledge of the murderers and of their mistake. No further information on the case was obtained until December 2001.

Two years later, Kristi married Troy Lunbery, a man she had dated occasionally before her marriage to Charlie. She and Troy have one child.

The Investigation Reopened. In December 2001, the investigation of the crime reopened. Detectives Steve Grashoff and Cliff Blankenship interviewed Troy on December 20, 2001. Later that day, at about noon, they dropped in on Kristi at her home. They told her they wanted to discuss Charlie's death. She could tell them to leave at any time. The interview was recorded.

For the first hour and one half, the detectives' approach was low-key, touching on various aspects of Kristi's life with Charlie and the events of April 17, 1992. Kristi was providing care to Jim, a man with severe mental retardation and epilepsy, and at various points in the interview his interruptions and inarticulate noises may be heard. Kristi's children were not home.

The interview became intense when the detectives showed her a FBI profile of the case and told her that a secret witness had inculpated her. Detective Grashoff then said, "Kristi, we think you did it." She denied it. The detectives said they knew she had done it and only wanted to know why. Was it

because he was abusive? "For God's sake, tell the truth," Grashoff urged.

Eventually, Grashoff asked, "Did you shoot Charlie?" She answered, "Yes."

Proceedings. Kristi was indicted for "open murder," permitting conviction for murder in the first degree. She was not taken into custody. In preparation for the trial, Kristi's two lawyers accepted her statement that she had confessed falsely to the crime. They set about to see whether there was evidence of persons confessing to crimes they had not committed. They came in contact with Richard Ofshe.

Ofshe holds a doctorate in psychology from Stanford University and is a professor of social psychology at the University of California at Berkeley. He has been an expert witness both for prosecutors and for defendants on the psychology of interrogations and the psychology of false confessions. At counsel's request, Ofshe interviewed Kristi. He reported that she had described to him "a well-recognized type of confession — a stress compliant false confession."

Ofshe suggested to counsel that they have Kristi further examined by a clinical psychologist familiar with the Gudjohnsson Suggestibility Test. The author of this test was Gisli H. Gudjonsson, a faculty member of the Institute of Psychiatry, King's College, London, who had written The Psychology of Interrogation and Confessions (2003). In that treatise, Gudjohnsson had reported on the basis of research that some confessions of crime were false. The false confessions were made either to shield another suspect or to end the stress of interrogation. There was no information on the number of false confessions. That they occurred was an established fact.

Counsel located one psychologist in the Redding area who had never heard of the Gudjonsson test, and another local psychologist who had heard of it but had never used it. Counsel did not investigate further. They entered into their trial file a memorandum stating their belief that Ofshe's testimony would be inadmissible and, if admitted, would have a negative impact on the jury because of its lack of substance.

Trial counsel sought pretrial rulings to permit the introduction of the evidence that the murder had been committed by Garza's partners. The trial court ruled against them.

At trial, the state suggested motives for murder — Charlie's $ 15,000 life insurance; the existence of an old boyfriend; Charlie's "controlling" conduct. However, one-third of the insurance had gone for Charlie's funeral; Kristi, as the mother of two little children, was dependent on Charlie's income. The ex-boyfriend was the man Kristi married two years later; he was not on the scene in 1992. That Charlie was abusive to Kristi was suggested to her by the detectives throughout the 2001 interview, and Kristi appeared to adopt that reasoning as her own when she confessed to the crime. There was no evidence of physical abuse. The popular psychological term "controlling" was picked up by the detectives as an alternate description of Charlie's conduct. When Kristi gave the detectives an example of Charlie being controlling, the story she told was not about Charlie at all but about his father.

Kristi denied her guilt and repudiated her confession. Witnesses testified to her gentle disposition. The prosecution attempted to show that the murder had been planned, but produced no evidence of premeditation. It became the

prosecution's burden to persuade the jury beyond a reasonable doubt that Kristi, at some time between 6:30 a.m. and 7:40 a.m., during which she had dressed and fed their children, had shot her husband and then had disposed of the murder weapon and any incriminating spots of blood. The sole significant evidence against her was her confession. The jury found her guilty of second degree murder.

Appeal. The centerpiece of the appeal was the evidence of third party culpability that the trial court had excluded. The California Court of Appeal for the Third Appellate District issued an unpublished opinion. As the Supreme Court of California summarily denied review, this unpublished opinion is the final judgment that in this habeas proceeding we review.

The court of appeal declared that "the only real evidence" that someone else had killed the victim was Rory Keim's report of Henry Garza's admission. That report was hearsay but admissible if three conditions were met. The first condition was that the declarant be unavailable. The condition was met. Garza was dead. The second was that the statement was against Garza's "penal interest." This condition, the court ruled, was not met. The third was that the declarant have "sufficient knowledge of the subject." This condition, too, the court of appeal said, had not been met. The court found that the statement "may have been nothing more than boasting or the mindless remark of someone under the influence of liquor," and deemed the statement inadmissible.

Once Garza's statement was ruled out, the court of appeal in a single paragraph disposed of the other evidence of Garza's connection to the murder, ruling that "it lacked sufficient probative value to

raise a reasonable doubt of defendant's guilt." Kristi's appeal was denied.

On December 7, 2006, Kristi filed a petition for habeas corpus with the Supreme Court of California. This petition included a claim of ineffective assistance of counsel. The petition was summarily denied.

On June 11, 2007, Kristi filed the present petition pursuant to 28 U.S.C. § 2254 in the district court. Habeas counsel interviewed Kristi's two defense lawyers as to why they had not offered Ofshe's testimony or investigated the false confession further. Each reported that the other had made the decision.

A magistrate judge recommended denial of the petition, and the district court denied it. This appeal followed.

STANDARD OF REVIEW

We review de novo the district court's denial of a petition for a writ of habeas corpus. *Musladin v. Lamarque,* 555 F.3d 830, 835 (9th Cir. 2009).

Lunbery filed her federal habeas petition after 1996, and thus the petition is subject to review under the Antiterrorism and Effective Death Penalty Act (AEDPA). Under AEDPA, a writ of habeas corpus may be granted only if the state court's decision (1) was "contrary to or involved an unreasonable application of clearly established Federal law, as determined by the Supreme Court of the United States," or (2) was "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d); *see also Davis v. Woodford,* 384 F.3d 628, 637 (9th Cir. 2004), *cert. dismissed,* 545 U.S. 1165

(2005). A decision involves an "unreasonable application" of federal law "if it correctly identifies the governing rule but unreasonably applies it to a new set of facts, or fails to extend a clearly established legal principle to a new context in a way that is unreasonable." *Himes v. Thompson,* 336 F.3d 848, 852 (9th Cir. 2003) (internal citations omitted).

ANALYSIS

I. *Ineffective assistance of counsel.*

Petitioner presses her claim that counsel was ineffective because they failed to call Professor Ofshe and failed to investigate further the validity of Kristi's confession. These failures, if established, constitute errors requiring the grant of the petition. *See Richter v. Hickman,* 578 F.3d 944, 952-53 (9th Cir. 2009) (en banc) (finding ineffective assistance of counsel where counsel failed to investigate and present at trial critical expert testimony), *cert. granted sub nom. Harrington v. Richter,* 130 S.Ct. 1506 (2010).

Failure has yet to be established. As evidence so far, we have only a memorandum in trial counsel's file stating why counsel decided not to call Ofshe and an affidavit of federal habeas counsel stating that she had interviewed Kristi's two defense counsel on the subject and that each had put responsibility on the other for not putting on expert evidence. To decide petitioner's claim we need the live testimony of her trial attorneys. *See Schriro v. Landrigan,* 550 U.S. 465, 474 (2007) ("In deciding whether to grant an evidentiary hearing, a federal court must consider whether such a hearing could enable an applicant to

prove the petition's factual allegations, which, if true, would entitle an applicant to federal habeas relief.").

We do not, however, need to delay our decision on her other contention.

II. *The right of defense.*

[1] The Sixth Amendment to the Constitution guarantees the right of a criminal defendant to have a public trial, to confront the witnesses against him and to obtain witnesses in his favor. These guarantees are incorporated by the due process clause of the Fourteenth Amendment, binding the states. Due process includes a right to " 'a meaningful opportunity to present a complete defense.' " *Crane v. Kentucky,* 476 U.S. 683, 690 (1986) *citing California v. Trombetta,* 467 U.S. 479, 485 (1984). That constitutional right is violated by the exclusion of probative admissible evidence that another person may have committed the crime. *Chambers v. Mississippi,* 410 U.S. 284, 302-03 (1972).

In *Chambers,* the defendant sought to introduce the testimony of three individuals to whom a third party had confessed to committing the murder for which Chambers was on trial. *Id.* at 298. The Mississippi State Supreme Court upheld the exclusion of this evidence because it was hearsay and not subject to exception under state evidentiary rules which, at the time, recognized only declarations against *pecuniary* interest. The United States Supreme Court noted that the hearsay statements involved in the case were made under circumstances that provided assurance of their reliability: the confessions were made spontaneously shortly after the murder, corroborated by some other evidence in the case, and were self-incriminatory. *Id.* at 300-01.

The Supreme Court ultimately determined that "under the facts and circumstances" of that case, exclusion of the evidence violated Chambers' constitutional rights. *Id.* at 303. Stating that "[f]ew rights are more fundamental than that of an accused to present witnesses in his own defense," the Supreme Court noted that the rejected testimony "bore persuasive assurances of trustworthiness" and that the "testimony also was critical to Chambers' defense." *Id.* at 302. "In these circumstances, where constitutional rights directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanistically to defeat the ends of justice." *Id.*

Chambers controls. The state court excluded as hearsay Rory Keim's testimony that Henry Garza, dead at the time of Kristi's trial, had admitted that his partners had murdered Charlie Bateson in error, and the California court of appeal affirmed that ruling.[1]

[2] As in Chambers, Garza's statement was against his penal interest. He admitted the murder had been committed by his "partners." He exposed himself to the risk of criminal prosecution. At a minimum, he was an accessory after the fact. Cal. Pen. Code §§ 32-33. At a maximum he was an accessory before the fact or a co-conspirator with the killers and subject to the same penalty as the actual murderer. *Bompensiero v. Superior Court,* 281 P.2d

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[1] As a habeas court, we do not review the propriety of the state court's application of its own evidentiary rules; rather, we consider whether it was unreasonable for it to conclude, in light of Chambers, that the exclusion did not violate Kristi's due process right to present a defense and receive a fair trial. *See Rice v. McCann,* 339 F.3d 546, 549 (7th Cir. 2003); *see also Chia v. Cambra,* 360 F.3d 997, 1003 (9th Cir. 2004).

250, 256 (Cal. 1955); Cal. Pen. Code §§ 971, 182(a). As in *Chambers*, Garza's statement was made shortly after the murder, albeit not to a close acquaintance. As in *Chambers*, the incriminating statement was corroborated by other evidence in the case: (1) an acquaintance of Delgado's indicated that Garza and the former tenant of Kristi's home, Frank Delgado, were involved in drug deals together and had been seen in the house with $40,000 worth of illegal drugs, (2) a confidential informant told police three days after the murder that Delgado had been the intended victim because he had ripped off several people in drug deals,[2] and (3) a neighbor saw a car linked to both Garza and Delgado on the street in front of Kristi's house a few hours before the murder. The excluded testimony thus bore substantial guarantees of trustworthiness and was critical to Kristi's defense. *Cf. Chambers*, 410 U.S. at 302; *Chia*, 360 F.3d at 1006-07 (applying *Chambers*).[3]

[3] As is usually the case with pieces of evidence, each item of information Kristi sought to introduce gave meaning and coherence to Garza's admission, put it in context, and explained it. The state court of appeal, however, addressed each item

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[2] This confidential informant came forward within three days of the murder. However, the detective or prosecutor lost all notes regarding the identity of this informant and Kristi was thus unable to place his testimony before the jury. The trial court also denied her request to introduce the informant's statement or advise the jury that the prosecution had failed to preserve identifying information of the informant.

[3] These facts also distinguish this case from our recent decision in *Christian v. Frank*, 595 F.3d 1076, 1084 (9th Cir. 2010), where there was a "dearth of other corroborating evidence linking [the third party] to the crime." Here, the murder evidence was completely consistent with Garza's out-of-court statement.

independently without connecting it to the chain of circumstances, thereby missing the probative force of the whole chain. By deeming Garza's statement to Keim inadmissible hearsay, the state court of appeal dismissed the remaining pieces of evidence as providing only motive and opportunity to commit the crime, because there was no direct or circumstantial evidence that a third party had done so. Had Garza's statement been admitted, however, this missing element would have been supplied, and the remaining pieces of the puzzle would have become more relevant.

[4] The denial of Kristi's right to present a defense was compounded and magnified by factual mistakes made by the court of appeal in the course of disposing of the evidence offered. The testimony of John Voet that identified the car in the cul-de-sac on the morning of the murder, April 17, was misstated by the court, putting the car there a day earlier on April 16, erroneously leading the court to conclude this evidence was not even probative.[4]

[5] The rulings of the state courts were prejudicial to Kristi's defense. Exclusion of the evidence of Garza's admission and Delgado's drug-dealing stripped her of evidence that someone other than she had probably committed the murder of her husband. Nor, as the state argues, was this evidence merely cumulative of other evidence in the trial. That Kristi's first statement to the police mentioned the drug-dealing at Fir Street was no substitute for Oney Rhoades' statement that he saw Garza and Delgado with a large amount of drugs at Fir Street, nor was it a substitute for Garza's admission that his partners

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[4] Moreover, the identification of the car as being associated with Garza was not mentioned by the court.

committed the murder. Statements made by Kristi, the defendant, could not have been given near the level of weight as this independent evidence.

[6] Because Kristi was prevented from presenting this evidence, she was prevented from offering any alternate theory as to who might have committed the crime. The jury would not have been confused by such evidence. It would probably have been led to a state of reasonable doubt. The murder called out for a murderer. The trial as conducted by the superior court and as approved by the court of appeal left only Charlie's wife in view as the murderer.

[7] An accused does not have an "unfettered right" to present any evidence he or she wishes. *Taylor v. Illinois*, 484 U.S. 400, 410 (1988). However, as *Chambers* teaches, depending on the facts and circumstances of the case, at times a state's rules of evidence cannot be mechanistically applied and must yield in favor of due process and the right to a fair trial. 410 U.S. at 302. As in *Chambers*, the excluded testimony here "bore persuasive assurances of trustworthiness" and "was critical to [Kristi's] defense." *Id.* California's application of its evidentiary rules denied Kristi her constitutional right to present a defense.

[8] That Kristi confessed to the crime does not detract from the prejudice flowing from her inability to present the defense of third party culpability, especially since she vigorously contested the truthfulness of that confession. The Supreme Court recently reaffirmed the rule of Chambers and other cases involving improper denials of the right to present a defense, when it overturned a South Carolina conviction in which a defendant was denied the opportunity to present evidence of third party

culpability because of the strength of forensic evidence in that case. *See Holmes v. South Carolina*, 547 U.S. 319, 326-31 (2006). The error in this case had a "substantial and injurious effect" on the verdict, and therefore is not harmless. *See Brecht v. Abrahamson*, 507 U.S. 619, 637-38 (1993). The California court of appeal's conclusion to the contrary constitutes an objectively unreasonable application of Chambers. *See Chia*, 360 F.3d at 1006-07.

[9] For the reasons stated, the judgment of the district court is REVERSED and the case is REMANDED to it with direction to issue the writ.

HAWKINS , Circuit Judge, concurring:

I concur in the majority Opinion and write separately only because I believe Kristi Lunbery presented sufficient evidence that her trial defense counsel's decision not to further investigate or present expert testimony regarding false confessions fell below an objective standard of reasonableness.

The only evidence linking Kristi to the murder was her own statement, which she claimed was false. There was no forensic evidence connecting her to the crime, the murder weapon was never found and, even in her confession, Kristi displayed no knowledge of crime details not publicly known (such as the location of the murder weapon or how she managed to shoot her husband in a small, one bedroom house with two small children present). But she had confessed and it is hard to imagine anything more difficult to explain to a lay jury. After all, people do not just confess to crimes they did not commit, do they? Well, it turns out they sometimes do. Among the hundreds of persons exonerated of serious crimes through DNA

testing are numerous individuals who earlier confessed.[1]

Kristi's defense lawyers recognized this problem and reached out to an expert in the field of false confessions, Dr. Richard Ofshe. Dr. Ofshe reviewed various materials relating to the murder and a videotape of Kristi's confession, and concluded it was likely a "stress compliant false confession." For Dr. Ofshe, the failure of a confession to fit the facts of a crime and the inability of a confessor to supply information that should be known to the perpetrator were "hallmarks of a false confession."

Dr. Ofshe recommended that Kristi be evaluated by a competent clinical psychologist who was familiar with the phenomenon of stress compliant confessions, and, in particular, that Kristi take the "Gudjonsson test" for interrogative suggestibility. Kristi's attorney then contacted two local Redding psychologists; one had not heard of the test but agreed to "look into the situation"; the other had heard of it but had never administered it, and also suggested that he would need additional corroboration not mentioned by Dr. Ofshe to "support any conclusion that Kristi was vulnerable to manipulation techniques" (apparently not

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[1] Brandon L. Garrett, *The Substance of False Confessions*, 62 Stan. L. Rev. 1051 (April 2010) (examining forty false confessions to rapes and murders later exonerated by DNA evidence); *see also* Mark A. Godsey, *Shining the Bright Light on Police Interrogation in America*, 6 Ohio St. J. Crim. L. 711, 724 (Spring 2009) (noting that in addition to DNA exoneration, confessions have also been proven false when the identity of the true perpetrator is later discovered, or when it is later demonstrated it would have been physically impossible for the defendant to have committed the crime, such as when it is proven the defendant was in jail for another crime on the date the new crime occurred)

understanding he was only being asked to administer the test).

Kristi never took the Gudjonsson test prior to trial. In a somewhat confusing memo to the file, her attorney notes in one paragraph that he has made arrangements for Dr. Ofshe to testify on November 5th, then in the following paragraph concludes that the testimony would likely be inadmissible, and finally that it would be best simply to have Kristi testify because the jury ultimately needed to believe her. After Kristi was convicted, Dr. Ofshe wrote to her to express his sadness and related that he had anticipated he would be testifying at her trial, noting that he did not discover he was not going to be called until he contacted the attorney's office himself and discovered the trial was already underway. When Kristi's habeas counsel contacted Kristi's trial attorneys about the decision not to call Dr. Ofshe, they engaged in finger pointing, each claiming the decision was made by the other.

Because the California Supreme Court summarily denied this claim without a reasoned opinion, we must conduct a de novo review of the record to determine whether the denial was contrary to or an unreasonable application of federal law. *Greene v. Lambert*, 288 F.3d 1081, 1088-89 (9th Cir. 2002). The district court concluded that Kristi failed to establish that her counsel's representation fell below an objective standard of reasonableness, *see Strickland*, 466 U.S. at 688, and concluded instead that counsel made a reasonable, tactical decision not to call Dr. Ofshe. But a tactical decision infers a calculated reason to do or not do something. Here there was no reason not to call Dr. Ofshe and every reason to do so. The record fairly smacks of incompetence, from the conflicting note to file, to the

attorneys pointing fingers at one another, to the failure to even communicate the decision to the expert. It is also far from clear whether any decision, reasoned or not, was ever made here or by whom. Even though "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable," the decision to prematurely limit an investigation may be, in and of itself, unreasonable. *Id.* at 690-91 ("[C]ounsel has a duty to make reasonable investigations.").

As the Supreme Court explained in *Wiggins v. Smith*, a premature choice to abandon a potentially fruitful avenue can make "a fully informed decision with respect to [ ] strategy impossible" and render counsel's performance deficient. 539 U.S. 510, 527-28 (2003). Here, counsel gave up after contacting two local psychologists by phone, and never tested Kristi to determine whether Dr. Ofshe's preliminary opinion could be bolstered or corroborated.

Counsel's proffered reasons for failing to offer Dr. Ofshe's testimony are also problematic. Counsel opined that Dr. Ofshe's testimony would likely be inadmissible if the government lodged a *Kelly-Frye* objection because the Gudjonsson test was not widely accepted.[2] Leaving aside that counsel failed to even attempt its admission, at the time of Kristi's trial, expert testimony based in part on the Gudjonsson test had been admitted in several other cases. *See Canady v. State*, 100 S.W. 3d 28, 31 (Tex. Ct. App. 2002); *United States v. Doe*, 74 F. Supp. 2d 310, 318 (S.D.N.Y. 1999); *United States v. Raposo*, 1998 WL 879723, *3, 5-6 (S.D.N.Y. Dec. 16, 1998); *see also Vent v. State*, 67 P.3d 661, 670 (Alaska App. 2003) (noting

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[2] The trial memo does not elaborate on whether this conclusion is based on further research, or if it is based only on unfamiliarity of two local psychologists with the test.

"case law and law review commentary is split over whether to admit false confession expert testimony").[3]

Second, counsel opined that Ofshe's testimony could have a "negative impact" because it was "so lacking in substance." This is not an excuse but a self-fulfilling prophesy: if Dr. Ofshe's testimony lacked "substance" or corroboration, it was due to counsel's failure to obtain testing that would have provided it, despite being advised to do so. Surely that should be enough, but counsel also appears to have discounted Dr. Ofshe's specialized expertise in the area of false confessions in favor of the preliminary views of a local psychologist, Dr. Caruso. Summing up the decision not to even attempt to offer Dr. Ofshe as a witness, counsel wrote: "As Dr. Caruso put it: 'Kristi's best defense would be her explanation, the jury needs to believe Kristi.'"

This rather naively assumes that a jury would be easily persuaded—that an innocent person would confess to a crime they did not commit—by the confessor's testimony alone. Of course the jury had to believe Kristi, but the jurors would have been better equipped to evaluate her credibility and the confession itself had they known of the identified traits of stress-compliant confessions and been able to compare them to her testimony. Reversing a conviction where the trial court excluded the testimony of the very expert involved here, the Seventh Circuit noted that Dr. Ofshe's testimony went to the heart of the defense, and had it been admitted, it "would have let the jury know that a

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[3] Indeed, after Kristi's trial, Dr. Ofshe's testimony was admitted in two other California cases, *People v. Gulley*, 2008 WL 4152951, *8 (Cal. Ct. App. 2008), and *People v. Cota*, 2007 WL 3360054, *12 (Cal. Ct. App. 2007).

phenomenon known as false confessions exists, how to recognize it, and how to decide whether it fit the facts of the case being tried." *United States v. Hall*, 93 F.3d 1337, 1345 (7th Cir. 1996); *see also Boyer v. State*, 825 So.2d 418, 420 (Fla. Ct. App. 2002) ("It is for the jury to determine the weight to give to Dr. Ofshe's testimony, and to decide whether they believed his theory or 'the more commonplace explanation that the confession was true.' ") (quoting *Hall*, 93 F.3d at 1345).

For these reasons, in addition to the persuasive case for granting the writ made by Judge Noonan in the majority Opinion, I would also reverse the district court's decision that counsel's choice—not to further investigate or offer Dr. Ofshe as an expert witness—was a reasonable tactical decision and that the California court was not objectively unreasonable in denying the claim. Having said that, I agree that it is not presently necessary to delay the grant of the writ by remanding for an evidentiary hearing to determine *Strickland* prejudice.[4]

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[4] Obviously, if this were the only issue before us, I would favor remand for such purposes.

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JUN 29 2010
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APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

KRISTI LYN LUNBERY, Petitioner - Appellant, v. TINA HORNBEAK, Warden; ATTORNEY GENERAL, Respondents-Appellees.	No. 08-17576 D.C. No. 2:07-cv-01279-GGH Eastern District of California, Sacramento ORDER

Before: NOONAN, HAWKINS and M. SMITH, Circuit Judges.

Appellees' petition for rehearing is DENIED.

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